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Alice M. Donahue v. Warner Brothers Pictures Distributing Corporation et al : Brief of Respondents

Utah Supreme Court

Van Cott, Bagley, Cornwall & McCarthy; Dennis McCarthy; C. Vernon Langlois;
R. W. Perkins; Morris Ebenstein; Of Counsel;

In the
Supreme Court of the State of Utah

ALICE M. DONAHUE, BARBARA DONAHUE, and CONSTANCE MARILYN DONAHUE,
Plaintiffs and Appellants,

vs.

WARNER BROTHERS PICTURES DISTRIBUTING CORPORATION, INTERMOUNTAIN THEATRES, INC., ARCH E. OVERMAN and C. E. OVERMAN,
Defendants and Respondents.

Case No. 7965

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

The statement of facts set forth in the plaintiffs'* brief is substantially correct so far as it goes. It is, however, incomplete. It omits mention of certain procedural steps which shed much light on the case and glosses over

*Throughout this brief, appellants are referred to as plaintiffs and respondents are referred to as defendants, as in the trial court.

most of the testimonial evidence. For this reason and because of the importance of the case, it is deemed necessary to make a more detailed statement than is contained in plaintiffs' brief.

Procedural History

The original complaint in this case was filed in the District Court of Salt Lake County on November 30, 1949 (R. 1-5). It alleged that the motion picture "Look for the Silver Lining" depicted "the career and used the name of Jack Donahue * * * without the permission * * * of plaintiffs"; that "the said portrayal * * * [was] in part true to life and in many parts wholly untrue," and that as a result of the exhibition of the film by defendants "throughout the State of Utah and throughout the United States," the plaintiffs as the "heirs" of Jack Donahue had been "vexed and annoyed and humiliated and caused great mental and physical suffering" to their damage in the sum of $350,000.00. The complaint further asked for an injunction to prevent future showings of the motion picture (R. 1-5). All of the defendants named in the original complaint were served with process, except Warner Brothers Pictures, Inc., which later was dismissed out of the case on motion of the plaintiffs (R. 91). After filing of the complaint, on petition of the defendants the case was removed to the United States Districit Court for the District of Utah (R. 10-22). The propriety of the removal was not challenged by the plaintiffs. Instead, after a motion by the defendants for a more definite statement had been granted (R. 52-54), the plaintiffs filed in the federal court an amended complaint (R. 47-54).

The amended complaint was similar to the original complaint, except that it set forth in greater detail the particulars in which the portrayal of Jack Donahue was allegedly inaccurate (R. 49). The amended complaint like the original complaint claimed injury to the plaintiffs' feelings in that the exhibition of the film had "vexed and annoyed and humiliated" them to their damage. An injunction again was asked (R. 50-51). The amended complaint also contained in paragraph 9 thereof, allegations that the plaintiff, Alice M. Donahue, had collaborated in writing a manuscript portraying the true life and career of Jack Donahue which she had been prevented from selling by reason of the prior exhibition of "Look for the Silver Lining." There was no recital of injury or damage by reason of these "property" allegations. The federal court granted the defendants' motion to strike paragraph 9 on the ground it was immaterial and irrelevant to any purported cause of action based on an alleged violation of the Utah right of privacy statute (R. 46). The defendants thereafter filed separate answers to the amended complaint (R. 38-45). Interrogatories were propounded by both sides (R. 29-32; 36-37) and answered (R. 33-35; 78-86), and the deposition of Mrs. Donahue was taken (R. 64-65). The defendants then filed a motion for summary judgment, which was heard and granted by the federal court on September 29, 1950 (R. 26).

The basis of the ruling of the federal court in granting summary judgment was that: (a) The Utah right of privacy statute, Sections 103-4-8 and 103-4-9 of the *Utah Code Anno.* (1943), was invalid under state and federal con-

stitutional guarantees of free speech and the press if construed as claimed by the plaintiffs. (b) The aforesaid statutory prohibition against the use of a name, portrait or picture of a deceased person for "advertising purposes or for purposes of trade" was not applicable to the exhibition of motion pictures. (c) Under the Utah conflict of laws rule in tort cases, the substantive rights of the plaintiffs must be determined by the law of the place of injury, which in this instance was California where the plaintiffs at all times resided and were physically present, and under the law of California the plaintiffs were without remedy. In light of the foregoing, the federal court held that on the basis of the pleadings, depositions, admissions and affidavits on file, no genuine issue existed as to any material fact. Accordingly, summary judgment in favor of each of the defendants was entered (R. 26). From this judgment, the plaintiffs appealed to the United States Court of Appeals, Tenth Circuit.

The case was argued before the Tenth Circuit on three separate occasions. The first hearing was held before three judges of that Court. About a month later, a reargument was ordered before the full court of five judges. Several weeks later an opinion was handed down affirming the lower court's judgment by a three to two vote of the judges. Upon plaintiffs' petition for rehearing, the case was set down for reargument a third time, and in its final opinion the Court reversed its previous position and entered a three to two decision in favor of the plaintiffs (R. 24-25). The final majority opinion and the dissenting opinion by Chief Judge Phillips are reported at 194 F. (2d) 6; 15. In sub-

stance, the majority opinion holds that: (a) The constitutional guarantees of free speech and press are applicable only to publications which are essentially educational or informative or purely biographical, and unless the motion picture involved in this case comes within one of these categories, it would be inhibited by the Utah statute. (b) Motion pictures or other publications "based primarily upon fiction or the imagination and designed primarily to entertain and amuse an audience desiring entertainment and willing to pay therefor" constitute "trade" within the meaning of that term in the Utah statute, and if "Look for the Silver Lining" were a publication of that type it would be prohibited by the Utah statute, as distinguished from a publication of the type protected by the First and Fourteenth Amendments. (c) On the basis of the allegations of the plaintiffs' amended complaint, it could not be determined as a matter of law whether "Look for the Silver Lining" was within the protection of free speech and the press as defined and limited by the Court or whether it was proscribed by the statutory prohibition against "trade" as defined by the Court; therefore, it was decided that the case should be returned to the lower court for further proceedings. The majority opinion seemingly ignored the conflict of laws argument urged by the defendants. With reference to the ruling of the lower court in striking the "property" allegations of paragraph 9, the Court said that such action was not error, since the allegations did not bear any relevancy or materiality to any cause of action based on the Utah right of privacy statute.

After the Tenth Circuit had returned the case to the lower federal court, the plaintiffs made a motion to remand the cause to the state court from which it originally had been removed, on the ground that removal had been improvident (R. 23). Defendants consented to the motion. The federal court so ordered (R. 61). After remand, the parties filed a stipulation and order signed by one of the state court judges on June 14, 1952, in which it was provided that the pleadings and papers which theretofore had been filed in the federal court should be treated as if they had been filed originally in the state court (R. 63-65). The same stipulation and order provided that the action of the federal court in striking the "property" allegations of paragraph 9 should be adopted as the ruling of the state court (R. 64).

Certain preliminary motions and arguments then were heard and disposed of by the state court, including a denial by the trial judge on August 13, 1952, of a motion by plaintiffs to further amend the amended complaint by adding certain allegations pertaining to additional "property" claims of plaintiffs (R. 67; 69). Defendants, without objection, were granted leave to file amendments to their answers setting forth counterclaims for a declaratory judgment (R. 93). These counterclaims requested a declaratory judgment with respect to the defendants' right to exhibit and re-exhibit in Utah "Look for the Silver Lining" also other and similar type motion pictures portraying deceased public figures such as Jack Donahue either factually or fictionally (R. 94-109). Plaintiffs filed a reply admitting substantially all of the allegations for declaratory relief (R. 110-111).

The case proceeded to trial in the state court on November 17, 1952. Testimony was heard for five days (R. 112-166), also the motion picture "Look for the Silver Lining" was exhibited to the jury and trial court (R. 363-368). At the conclusion of the evidence and after both sides had rested, the defendants moved for a directed verdict, advancing substantially the same contentions with respect to the construction of the Utah statute and the applicable conflict of laws rule as they had urged throughout the case. The trial judge took the motion under advisement (R. 115) and submitted the issues to the jury (R. 116). With respect to the construction of the Utah statute, the jury was instructed (R. 151-171; 544-558) in accordance with the views expressed in the majority opinion of the Tenth Circuit. The jury returned a verdict of "no cause of action" in favor of the defendants (R. 172). On December 16, 1952, the trial court overruled the plaintiffs' motion for a new trial, and granted the defendants' request for declaratory relief as prayed in their counterclaims (R. 175). In the declaratory judgment (R. 179-181), the trial court adopted views of the law contrary to the majority of the Tenth Circuit, but consistent with the minority opinion of Chief Judge Phillips.

Testimony at the Trial

The only witnesses called by the plaintiffs during the trial were Mrs. Alice M. Donahue, the widow of Jack Donahue, and her two daughters, Barbara and Constance Marilyn. The two daughters were only seven and five years of age, respectively, when their father died (R. 337; 354).

Their brief testimony (R. 337-361) added nothing of significance to that of Mrs. Donahue's.

Mrs. Alice M. Donahue testified as follows:

She was the widow of Jack Donahue (R. 206). She and her daughters were residents of Los Angeles, California, and had regarded California as their home since 1936. Prior thereto they had resided in New York and Massachusetts (R. 214; 254). Until the time of the trial, they had never been in Utah except to stay overnight at a motor court on the way to their summer home at Cape Cod (R. 253).

Jack Donahue, whose real name was John James Donahue (R. 274), was born in Charlestown, Massachusetts (R. 284). His father's name was Dennis; his mother's name was Julia. He had a brother Joe and another brother Walter. His sisters were Margy and Alice (R. 274). Mrs. Donahue first met Jack Donahue in 1910, when she was only fourteen years of age (R. 275). Jack was then seventeen or eighteen years of age (R. 275). Prior to their meeting, Jack Donahue had done some dancing in vaudeville theatres on amateur nights, but he had done no professional dancing (R. 207; 275). She had done amateur ballet dancing, but had had no professional engagements (R. 207). Alice's mother advertised in the *Boston Globe* for a dancing partner for Alice and Jack answered the ad. Thereafter they became a dancing team. During their first few engagements they danced under the name of "Scott and Duprey" (R. 207). Later they used their own names of "Donahue and Stewart" or "Stewart and Donahue" (R. 208). As indi-

cated by the scrapbooks, Exhibits 1-8 incl., they toured the country as a dancing and comedy team from 1910 to 1920, and intermittently from 1920 to 1925 (R. 208; 250-251). Alice and Jack were married April 6, 1911, the year following their first meeting (R. 208). They had three children. Alma, the first child, was born in 1920 (R. 209). Barbara was born in 1922. Constance Marilyn was born in 1925 (R. 213). Since filing of the present lawsuit, Alma had died (R. 194).

Jack Donahue first played in a Broadway show in "Kitchy-Koo" in 1918-1919. He next had a part in "Angel Face" and in the "Ziegfeld Follies" of 1920 and 1921 (R. 218). In 1921-1922 he played in "Two Little Girls in Blue" and starred in a dancing and comedy part in "Molly Darling" (R. 219). He appeared in "Be Yourself" in 1924-1925. In 1925-1927, he co-starred with Marilyn Miller in "Sunny" at the New Amsterdam Theatre (R. 220). He next starred with Marilyn Miller in "Rosalie" (R. 221). In both "Sunny" and "Rosalie" Jack Donahue played a dancing and comedy part (R. 246). Jack Donahue was co-author with Fred Thompson of the show "Sons O' Guns." He wrote his own scenes and starred in the show during the season of 1929-1930 (R. 222). Jack Donahue died October 1, 1930, at the age of 38 years (R. 223). At the time of his death he was regarded as one of the top dancing-comedian entertainers of his day (R. 243).

Mrs. Donahue and her daughters saw the motion picture "Look for the Silver Lining" at a preview showing at Beverly Hills Theatre in Los Angeles on March 15, 1949 (R. 244; 251). They saw the motion picture only on that

one occasion (R. 225). They regarded it as an attempted portrayal of the life and character of Jack Donahue (R. 334). It was produced and exhibited without their consent (R. 95).

"Look for the Silver Lining" is principally the story of Marilyn Miller. Jack Donahue is really a secondary character (R. 316). The motion picture shows Marilyn Miller dancing as a child in an act called the "Five Columbians" (R. 231; 317). Later she becomes a star on Broadway and appears in such well-known productions as "Sally" and "Sunny." Scenes from these productions are reproduced in "Look for the Silver Lining" (R. 317). The part of Marilyn Miller is played by June Haver and the part of Jack Donahue by Ray Bolger (R. 226). According to Mrs. Donahue, the motion picture is untrue in its portrayal of Jack Donahue, except that Marilyn Miller and Jack Donahue did star together in "Sunny" and "Rosalie" and Jack Donahue was a dancer (R. 228).

In Mrs. Donahue's opinion, Jack Donahue is shown in the picture as brash, forward and self-confident, whereas in fact he was shy and diffident (R. 229-230). The motion picture shows Jack Donahue meeting Marilyn Miller in 1913 or 1914, when she was a young girl with the "Five Columbians." In fact, Jack Donahue and Marilyn Miller didn't meet until they started rehearsing for "Sunny" in 1925 (R. 232). The motion picture shows Jack Donahue and Marilyn Miller dancing on the stage of a night club in London in 1913 or 1914. Also in the same sequence, Jack Donahue is shown exhibiting a picture of his baby daughter to Marilyn Miller. According to Mrs. Donahue, Jack Don-

ahue never danced at a night club in London (R. 230) and at that time he had no children (R. 231). Jack Donahue did go to London in 1923 and spent four weeks there. Mrs. Donahue did not go with him (R. 329), and therefore she could not say from her personal knowledge whether or not he went to a night club (R. 329).

Another thing Mrs. Donahue objected to in the motion picture was that it indicated a great friendliness between Jack Donahue and Marilyn Miller. In real life, however, the friendliness was of such a nature that the Donahue's youngest daughter was christened Constance Marilyn, after Miss Miller (R. 314). As a publicity stunt Marilyn Miller acted as godmother at the christening (R. 314). They all went to a church and posed for newspaper pictures. A newspaper photograph of the event is contained in one of the scrapbooks, Exhibit 3. But it was just a publicity stunt and more fictionalization. A proper christening ceremony was performed later (R. 315). The motion picture makes hardly any reference to Jack Donahue's home life (R. 335). It does indicate that at one point in her career, Marilyn Miller had a romantic attachment for Jack Donahue. But then Jack Donahue in the kindest way tells her that he is happily married, that he thought everybody knew it, and he shows Marilyn a picture of his baby girl and invites her to come and see his family (R. 335). Mrs. Donahue admitted that this scene constituted the only reference in the motion picture to Jack Donahue's home life (R. 335) and there was nothing in that scene which unfavorably reflected on it (R. 336).

Mrs. Donahue agreed that in real life Jack Donahue was a merry and happy person. He would give encouragement to another young artist (R. 318). He frequently was referred to as "The Man with the Laughing Feet" (R. 319), and as one of the foremost dancers and comedians of his time (R. 319). In real life, Jack Donahue was a friendly, sincere, and understanding person (R. 320). He was devoted to the stage and to his art, and spent his whole life trying to become a success (R. 321). In real life, Jack Donahue was a very charming man (R. 321). One of his great qualities was his kindness (R. 321). He had the ability to captivate audiences and project a glow of warmth across the footlights (R. 321-322). He had a capacity for friendship and loyalty (R. 322). He also was a person of imagination and was good at improvisations (R. 323). He earnestly applied himself to his work in the "show must go on" tradition (R. 324). Mrs. Donahue conceded the foregoing qualities of personality were important (R. 324). She wouldn't agree, however, that these qualities of personality would be the really important things in any portrayal of Jack Donahue (R. 324-325). Furthermore, she did not think that "Look for the Silver Lining" portrayed Jack Donahue as possessing any of these characteristics (R. 320-324).

Before Mrs. Donahue ever had seen "Look for the Silver Lining" she consulted with her attorney, Mr. Louis Blau of Los Angeles (R. 252). Mr. Blau was an associate of Mr. Chester Smith, who was in the courtroom assisting Mr. Arnold Rich in the trial of the case (R. 251). Mr. Blau thought it would be a good idea if she and her daugh-

ters went to see the motion picture, so they did (R. 252). They were terribly upset (R. 324), humiliated and distressed by the movie (R. 235; 255). In leaving the theatre, they felt like little dogs running out. The thing that seemed so terrible was the way they were ignored (R. 235). No one spoke to them in the lobby except a man connected with Warner Bros. by the name of B. S. DeSylva (R. 235). Until she saw the motion picture at the Beverly Hills Theatre on March 15, 1949, her feelings had not been hurt by the portrayal of Jack Donahue (R. 257; 259). It was when she saw the picture that her feelings were hurt (R. 257-258). Neither Mrs. Donahue nor her daughters ever had seen "Look for the Silver Lining" in Utah (R. 225). She first learned it had been exhibited in Utah from Mr. Preston D. Richards, another one of her attorneys. Mr. Richards came to see her at her home in Los Angeles (R. 247). So far as the hurt to her feelings were concerned, she never had picked out any particular states in which to measure her hurt, except California and Utah. She didn't know why she had picked out Utah (R. 258). She had no knowledge of any particular exhibition of the motion picture in Utah by any of the defendants named. She just knew in a general way that the picture had been exhibited in Utah (R. 273). Mrs. Donahue didn't think that she could limit the hurt to her feelings to the boundaries of any particular state (R. 262). The damages asked in her amended complaint were based upon the hurt she felt as a result of the exhibition of the motion picture throughout the United States and throughout the world (R. 262; 265-266). The prayer for damages referred to all exhibitions of the mo-

tion picture, including the exhibition at the Beverly Hills Theatre in Los Angeles which she and her daughters had witnessed (R. 265). It was upon seeing the picture in California that she felt the most acute shock to her feelings (R. 265).

Mrs. Donahue and Jack Donahue wrote a book entitled *Letters of a Hoofer to His Ma.* They collaborated, even though Jack Donahue's name was used as author (R. 215). The chapters that made up the book were serialized in the *Cosmopolitan Magazine* during Jack Donahue's lifetime. After his death, Mrs. Donahue put the material together in book form and arranged for its publication (R. 215; 276). The book concerns a dancer and comedian named Jack Donahue, who does eccentric dancing (R. 277). In the book, as in fact, Jack Donahue has a father by the name of Dennis (R. 277), brothers by the name of Walter and Joe, and a mother named Julia (R. 278). Also, as in real life, the Jack Donahue portrayed in the book came from Charlestown, Massachussetts, and the names of places where he performed were the actual places where Jack Donahue did perform (R. 278). At the beginning of each chapter or letter in the book is a date and a program. These dates and programs were taken from the actual programs used at the places where Jack and Mrs. Donahue appeared (R. 280). However, the incidents contained in *Letters of a Hoofer to His Ma* are fictional (R. 277). For example, the reference in the book to how Jack Donahue's father liked his whiskey are fictional (R. 278). The same is true of the episodes in which Jack Donahue becomes romantically involved with girls possessing foreign accents (R. 279).

The book also refers to an incident at the old Howard Theatre, a burlesque house in Boston, involving Jack Donahue's father, his brother Joe, and certain gag lines concerning the "smallness" of his father (R. 281-282). This did not actually occur (R. 283), even though the same monologue was used by Jack Donahue in some of his stage performances (R. 290). As in the book, Jack Donahue often fictionalized himself and his life (R. 327). He frequently ridiculed himself in order to get laughs (R. 328).

During his lifetime, Jack Donahue wrote for the *Saturday Evening Post* (R. 215), including an article entitled "Ad Libbing" which appeared in the issue of October 5, 1929, and an article entitled "Hoofing" published on September 14, 1929 (R. 285). Mrs. Donahue collected data and did the research work for these articles (R. 215; 285). The articles purport to refer to the personal history of Jack Donahue and his dancing career. Some of the incidents related therein are true and some are untrue (R. 285). Articles of this sort were used for publicity purposes (R. 286; 288). In the article "Ad Libbing" it is not true as stated therein that Jack Donahue ran away from home at an early age, that he joined Dr. Zurega's traveling medicine show, that he toured the country with the medicine show doing dance routines and eventually was brought home by a truant officer (R. 286-287). Neither is it true as reported in the article that Jack Donahue played with a stock company at Muff, Utah, or that he toured the country doing solo dancing (R. 289). It is true as stated in the article that Jack Donahue's father worked in the Navy Yard at Charlestown (R. 290), and that his father opposed

his son's stage ambitions (R. 288). It is true also that Jack Donahue did perform a monologue in which he made uncomplimentary jokes about his father (R. 290-291). Also the portion of the article telling about the Broadway shows in which Jack Donahue appeared is true (R. 295). Even though the article purports to be actual experiences of Jack Donahue, it is largely fictional. Jack Donahue was just trying to be funny (R. 289). The same situation exists in connection with the episodes related in the article "Hoofing" (R. 293-295).

In 1943, Mrs. Donahue and a Miss Pulsifer collaborated in writing a biographical synopsis of Jack Donahue's life. The synopsis, finished in 1944, purported to portray Jack Donahue's life and career (R. 301). The manuscript as originally written was registered and the incidents contained therein concerning Jack Donahue's life were accurately set forth (R. 301; 304). However, after the present suit had been filed and Mrs. Donahue's deposition had been taken in February, 1950, the manuscript was rewritten and revised (R. 305). The first twenty-three or twenty-four pages of the revised manuscript are fictional and were added for the purpose of creating interest in Jack Donahue's life (R. 301-302; 305; 327). This was done because they could not get any interest in the registered version (R. 305). The fictional material added by Mrs. Donahue and Miss Pulsifer was taken in part from the *Saturday Evening Post* articles (R. 301). The revised synopsis was prepared with the idea that it eventually might be made into a screen play (R. 326). Through her agent, Mrs. Donahue attempted to interest various motion picture companies in the revised version of the manuscript (R. 306). Her agent submitted

it to various motion picture companies (R. 302). The manuscript was admitted in evidence at the trial as Exhibit 12 (R. 190).

Mrs. Donahue conceded that in the manuscript she had written, in the articles which Jack Donahue himself wrote, and in the interviews which Jack Donahue gave out to newspaper reporters and writers, his life and career were continuously fictionalized (R. 308; 314). He frequently represented that he had done single vaudeville around the country during his early career, which was not true (R. 325). He frequently represented himself as having danced in burlesque, which was not true (R. 328). In the scrapbooks, Exhibits 1-8, and in various newspaper articles many references are made to experiences in Jack Donahue's life, which are purely fictional. This continued even after his death. For example, the *New York Times* of October 2, 1930, carried an article announcing Jack Donahue's death (R. 306). The obituary refers to Donahue's part in a traveling medicine show, his participation in specialty numbers between acts of plays by the young Adams Repertoire Troupe in Chicago, and to his acting in burlesque stock before moving into vaudeville. This was all untrue (R. 307-308).

According to Mrs. Donahue, show business is the great world of make-believe (R. 333). It is common among public entertainers for them to fictionalize episodes in their lives (R. 314). Jack Donahue continuously conformed to this pattern. He thought such representations were amusing (R. 309; 314), that they added color, glamor and interest to his career (R. 309). In order to appear funny, both

Jack Donahue and Mrs. Donahue assumed all kinds of crazy poses and did all sorts of crazy antics and often had their pictures taken in these poses. These pictures frequently were published in the newspapers, as indicated by the scrapbooks (R. 310). Mrs. Donahue, herself, created quite a sensation for those days by wearing tight trousers in one of their acts (R. 311). There were many unfavorable comments about it. The act was termed "crude" by some people (R. 311). *The London* newspaper in Canada referred to her as unnecessarily vulgar and suggestive (R. 311). She and Jack Donahue also had a stunt termed a "shirt-tail gag" (R. 312). But Mrs. Donahue and her husband were show people and were used to taking the bad with the good. Among the things they were especially concerned about was that their names and act be kept before the public and that they should attract public notice. They wanted their act and their personalities well-known (R. 313).

At the conclusion of the plaintiff's case, the defendants called as witnesses, Professor Walter Prichard Eaton, Dr. Lorin F. Wheelwright, Professor Lilla Belle Pitts, Dr. Mark May and Mr. Eric Haight. All of these witnesses testified to the educational and informative value of "Look for the Silver Lining." The motion picture, itself, also was shown to the court and jury (R. 363-368).

Professor Walter Prichard Eaton testified as follows:

For many years he was dramatic critic for *The New York Tribune, The New York Sun,* and *The American Magazine* (R. 472). From 1919 to 1922 he was lecturer in dramatic criticism at the School of Journalism, Columbia

University. He had lectured on the history of the American theatre at summer schools from Harvard and Columbia and the University of Iowa to the Utah State Agricultural College at Logan, Utah. In 1933, he succeeded George Pierce Baker as Professor of Playwrighting at Yale University (R. 472). Since his retirement at Yale in 1947, he has taught courses in playwriting and American dramatic history at the University of Texas, University of North Carolina, and Rawlins College, Florida (R. 473). He has written two or three collections of dramatic criticisms, also a book entitled *The Actor's Heritage,* another entitled *The History of the Theatre Guild for the First Ten Years,* and a textbook *The Drama in England.* He also has written quite a number of plays for radio and television, including "Queen Victoria" which was produced on Broadway (R. 470).

When one speaks of playwriting, the motion picture is included since the motion picture is really the dramatic medium of today. If a motion picture does not have the same dramatic structure as a play, it will not succeed (R. 474). As a teacher and dramatic critic, he would classify "Look for the Silver Lining" as a biographical play about the life and times of Marilyn Miller and Jack Donahue (R. 474-475). Of course, there is no such thing as a biographical play in the scientific sense (R. 475). No historical or biographical play ever has been written which did not contain some fictional elements. "Anthony and Cleopatra" would be classified as a biographical play, though Shakespeare knew nothing about either of them (R. 492). It is doubtful that either Anthony or Cleopatra spoke in blank verse in real life (R. 490). If a biographical play has noth-

ing in it but absolute, accurate facts, practically all dialogue would have to be eliminated. You cannot have a play unless the characters speak, and that means the writer has to make up the conversation. The moment you start to write an historical play, you start to write fiction and nothing else can be made out of it (R. 475). The goal of the dramatist is to make the conversation typical of the person involved (R. 475-477). Another problem of the playwright is the necessity to condense. In writing a biographical play, dramatic episodes covering many years have to be compressed into the length of a play. A play must have a beginning and an ending; it has to move forward and carry the interest of the audience. To accomplish this certain episodes must be compressed and others invented. The writer of a biographical play or motion picture has the constant problem of how much he must alter facts and juggle dates in order to make an effective story (R. 476-477).

That parts of the motion picture "Look for the Silver Lining" may be fictional would not change its classification as a biographical play (R. 478). The only pertinent question is whether the motion picture contains so much fiction that it alters the underlying purpose of the play. The underlying purpose of "Look for the Silver Lining" is to depict an era (R. 478). In this, the motion picture reasonably well resolves the dramatic problems which confronted its authors (R. 479). The fictionalized parts were necessary. For example, the motion picture shows Marilyn Miller joining her family on the stage when she is about fifteen years old. In fact, she did so when she was only

five years old. The reason for the change is obvious. No adult actress could play a five year old at the beginning of the picture and create any illusion. Another change is the introduction of Jack Donahue in the motion picture long before he actually did meet Marilyn Miller. Why is this? Because he is the second most important person in the play. If he were not introduced until he actually did meet Marilyin Miller when they began rehearsals for "Sunny," more than half the motion picture would be over before Jack Donahue's appearance. You would say, "Where did this stranger come from?" So he is brought into the story early, in violation of actual chronology, in order that the audience may meet him, get to know him, see him dance, and feel something of his quality when the play swings toward its climax (R. 480). So far as Jack Donahue is concerned, he is shown in the motion picture as a real person. The purpose of the portrayal is to represent the kind of man that he was. Whether he went to London in 1914 or 1923 is utterly unimportant. The important thing is whether the portrayal shows the same kind of a person as the real Jack Donahue. Was he a kind soul? Did he have twinkling feet? Is he a person who makes us feel warm and good when we see him? These important things the motion picture correctly represents (R. 492).

In Professor Eaton's opinion "Look for the Silver Lining" would be of educational value to college students (R. 481). It illustrates phases of early vaudeville. It shows the development from vaudeville to the musical comedy revue of the 1920's. By seeing "Look for the Silver Lining" a student of the American Theatre would get a feeling of

what that period was like. It is historically educational to see that at the same time F. Scott Fitzgerald's flaming youth were swallowing bathtub gin, the delightful and wholesome Jack Donahue was captivating the rest of the people. If one is studying the American Theatre, "Sally" and "Sunny" are not the most important things in it, but they are part of the picture. Marilyn Miller and Jack Donahue were the top performers on the musical comedy stage of their day. "Look for the Silver Lining" in its portrayal of these two outstanding personalities is a kind of antidote to a great deal of the books and criticisms of that era (R. 482). Like Mark Sullivan's history of *Our Times* or Fred Allen's book concerning the *First Fifty Years of Life in the Nineteenth Century,* "Look for the Silver Lining" tells of the songs that people of that time were singing and of the places and plays people were attending (R. 483).

The creation and exhibition of a play or motion picture is not considered a matter of "trade" by authors, critics or anyone familiar with the drama (R. 485). The production of a play or motion picture is regarded as an artistic accomplishment. The writer or composer is giving out to the public his idea or conception of something in life (R. 487). When the creation is completed, the artist turns to something else. The object of trade is something like Campbell's soup that is reproduced over and over again (R. 497). For instance, there is a product known as Prince Albert Tobacco. Stamped on each can is a picture of Prince Albert in his whiskers and long frock coat (R. 488). Clearly, that is the use of a picture of an historical character for the purposes of trade and advertising. In contrast, in the

play "Victoria Regina" in which Helen Hayes had such an enormous success two or three years ago, there were several episodes about the same Prince Albert with the same whiskers and the same long frock coat. Certainly, the author of "Victoria Regina" did not regard himself as engaging in trade when he wrote that play (R. 489).

When Salt Lake City was only thirteen years old and still a tiny hamlet in the desert, the people working and toiling together created a perfectly beautiful theatre, the old Salt Lake Theatre. It was the finest buildings of its kind west of the Rocky Mountains and accoustically the best in America. For eight or ten years there were no railroads and no traveling stock companies weré able to come to Salt Lake, so the people organized their own company and gave plays and charged admission. Finally, the railroad arrived and the traveling stock companies could get to Utah, and then Booth and Barrett and all the great actors and actresses of America came to Salt Lake. But did anyone believe that what went on in that beautiful old theatre was trade? (R. 500). Not at all. The people believed, as Brigham Young had said, that the dramatic entertainment of a people was just as important to their health and happiness as their religion (R. 500). A person who makes a play or a motion picture and the person who exhibits it and charges admission therefor is a purveyor of a kind of spiritual food. You can't call that "trade" by any common understanding of the word (R. 501).

Professor Eaton recalled having met Jack Donahue personally and having seen him perform in several of his Broadway successes (R. 484). On the basis of his personal

observation, he thought the Jack Donahue portrayed in "Look for the Silver Lining" was quite similar to the Jack Donahue of real life. He thought Ray Bolger's dancing approximated the charm and twinkle of the real Jack Donahue extraordinarily well (R. 484).

Dr. Lorin F. Wheelwright testified as follows:

He graduated from the University of Utah with a major in music and a minor in educational psychology. He received a Ph.D. from Columbia University, where his doctor's thesis had to do with the reading of music (R. 369; 373). Alexander Schreiner and Edward P. Kimball trained him as an organist (R. 370). He was the Director of the Arts Division of the Utah Centennial Commission and Production Manager of the musical play "Promised Valley" (R. 371). From 1936 to 1949, he was Supervisor of Music in the Salt Lake City Schools (R. 371). On behalf of the Philosophical Library of New York he wrote a chapter dealing with the use of films in music education in the book *Films in Education.* Since and during his connection with the Salt Lake City Schools, he has served as Chairman of the Audio Visual Aids Committee which previews motion pictures for use in the city schools (R. 374).

Dr. Wheelwright has viewed "Look for the Silver Lining" (R. 375) and in his opinion it has definite educational values (R. 376). In nearly all schools today, there are expensive auditoriums built mainly for the purpose of permitting students to stage operettas and other dramatic presentations. "Look for the Silver Lining" has a direct bearing upon the required skills and ideals of good showmanship

(R. 377). It gives an acquaintance with productions as they take place on Broadway under original settings. Excerpts from musical productions such as "Sally" and "Sunny" give the student a chance to better visualize what his job is in school productions (R. 400). "Look for the Silver Lining" teaches what hard work show people must go through in order to achieve excellence in their profession. It emphasizes the necessity for rehearsal (R. 378). It portrays the ideal that success is never won alone, but must be shared (R. 380); that success is a joint responsibility and a joint reward (R. 381). It adheres to the ideal that human affection is something to cherish (R. 381). It illustrates that friendship is the result of the sincerity of the individual in his interest toward others (R. 381). The characterization of Jack Donahue in the film shows a man, who though an expert entertainer, is the personification of friendship and courtesy (R. 381). Another ideal of human affection shown in the film is the marital relationship, which is treated on a high class basis (R. 385). It illustrates also the necessity for self-confidence, without which one fails in the theatrical business as in other aspects of life (R. 379). Another teaching is that the audience must be pleased (R. 379). The picture shows the necessity of good communication from the actors to the audience. Not only is there good speech, but clean articulation in the musical and dancing rhythms (R. 387).

One of the basic elements of good showmanship is that every drama in order to be interesting must portray conflict. Conflict is usually of three kinds: (1) Man against man. (2) Man against his fate, the thing he cannot control.

(3) Man against himself, that which he could become or wishes to become. "Look for the Silver Lining" portrays all three of these types of conflict (R. 388-389). It is beautifully put together and expresses a unity from begining to end. The musical theme helps tie the picture together. The characterizations are consistent throughout. It gives proper emphasis where needed. The film has coherence (R. 390), and by the use of such devices as "the dissolve" and "the montage," the action of the play moves forward and keeps the audience fascinated. Furthermore, the action and characterizations are plausible (R. 391).

In addition to the elements of good showmanship taught by "Look for the Silver Lining," it helps to acquaint people with an important period of American culture (R. 399). The film shows the historical transition of show business from the vaudeville, to the revue, to the light opera (R. 377). It gives an acquaintance with the musical culture of a certain period in American life (R. 400). It acquaints people with productions such as "Sally" and "Sunny," which are part of the literature of America (R. 404). It shows good orchestration when it is well performed. It shows singers singing under certain conditions. It shows how a solo performance is worked into an ensemble (R. 400). It gives an acquaintance with historical personalities such as Marilyn Miller and Jack Donahue (R. 399).

The film does not lose in educational value because of its fictional elements (R. 394). In the art of story telling there are broad meanings which are more significant than critical details of fact (R. 395). When one is talking about

the honesty of Abraham Lincoln, the exact details of the various stories about Lincoln which illustrate this quality are not important (R. 396). So in "Look for the Silver Lining" events covering many years are compressed into several short scenes. This is done to convey the essential meanings of all the events of the period covered (R. 392). So too, in the portrayal of Marilyn Miller and Jack Donahue, certain dramatic license is taken to establish their personalities and accentuate their characteristics. It is unimportant when Jack Donahue met Marilyn Miller, but it is important that when he met her his attitude was one of respect and courtesy (R. 382; 397). Fictionalizing in drama or motion pictures also is justified in order to create greater interest and audience appeal (R. 421). One of the fundamental tenents of education is that interest must be aroused in the learner in order for him to learn (R. 423-424). For a film to have value in the educational field it must have audience appeal (R. 423). Whether a film has commercial value is beside the point, so far as its educational purpose is concerned. Shakespeare wrote many great plays that have commercial value and bring in money at the box office. Such plays likewise have a very substantial educational value (R. 423).

The schools of Salt Lake City constantly use and exhibit feature length film such as "Look for the Silver Lining" for educational purposes as part of their curricula. Comparable films that have been shown are "A Hundred Men and a Girl" starring Deanna Durbin and the Philadelphia Symphony Orchestra, also the motion picture "They Shall Have Music" featuring the violinist Jascha Heifitz

(R. 402). In Dr. Wheelwright's opinion "Look for the Silver Lining" is in the same category as these films (R. 403).

Professor Lilla Bell Pitts testified as follows:

Her business is the teaching of teachers. She is Professor of Music Education at Teachers College, Columbia University (R. 431). She has served as Supervisor of Music in the schools of Amarillo, Texas, Assistant Supervisor of Music in the schools of Dallas, Texas, and teacher of music in the Junior High Schools of Elizabeth, New Jersey (R. 432). She has been a visiting Professor of Music at various universities throughout the United States, including Brigham Young University at Provo, Utah. While at B. Y. U. she helped to write a state course of music study for the elementary schools of Utah (R. 432). At present she is engaged in writing a series of twenty-five to thirty music books for use in the schools. The project includes books for use from kindergarten through senior high school (R. 433). The grade school books already have been completed and are now in general use in all the schools throughout the United States (R. 433). She also has written a book on junior high school music called *Music Integration in the Junior High School* and a book entitled *Music Curriculum in the Changing World* (R. 433). She is past president of the National Music Educators' Conference (R. 434) and a member of the Music Teachers' National Association (R. 435). She has written a handbook concerning the use of motion picture films in music education (R. 437) entitled *Sixteen Millimeter Films for Musical Education* (R. 438). Among other things, the handbook informs

teachers where films are available and how they can be used. For example, it lists five different places in Utah where films can be obtained (R. 465). She is Chairman of the Music Committee of the National Music Educators' Conference which reviews and selects music films for use in the schools. In this capacity she saw a screening of "Look for the Silver Lining" (R. 439-440).

She is not being paid to testify in this case (R. 465-466), but came as a representative of the Music Educators' National Conference. This organization is eager to foster the use of all available enriching material to carry out its major purpose, which is to broaden the base of music education. The influence of motion pictures is so tremendous in its reach and the strength of its appeal that she has given a great deal of time to doing what she can to disseminate information on how films can be used to educational advantage (R. 466). If films of the quality of "Look for the Silver Lining" can be made available to the schools, it will be a distinct enrichment to the stock of teaching materials (R. 466). She has found that motion picture films are almost frighteningly influential as a media of education (R. 439).

In the opinion of Miss Pitts, "Look for the Silver Lining" is definitely educational (R. 441). She feels that the motion picture has a range comparable to *Til Eulenspiegel,* a story concerning a character of the Middle Ages put to music by the late Richard Strauss. The representations and legends built around this medieval comedian are comparable to the era portrayed in "Look for the Silver Lining" (R. 447). The film also is in the same category as Wagner's

opera *The Meistersinger* about Hans Sachs. In the days of the masters and the guilds, Hans Sachs was a master musician who really lived, and he influenced young people to write music from the heart rather than from precept (R. 447). In like manner "Look for the Silver Lining" represents a period of development in theatrical musical comedy (R. 461). Even though the two outstanding figures concerned in that development, Marilyn Miller and Jack Donahue, may not be portrayed with strict accuracy from the standpoint of chronology and conjunction of episodes, they are truly portrayed as representative of that period of culture (R. 462).

In the opinion of Miss Pitts "Look for the Silver Lining" is an historical motion picture from the standpoint of the era depicted (R. 446-447). There are elements of reality in it which are true to the spirit of the times (R. 447). The fact that the film fictionalizes certain incidents in the life of Jack Donahue does not impair its educational value (R. 444). Marilyn Miller and Jack Donahue were outstandingly influential in the period from 1920 to 1930. Their portrayal in the film is symbolical of the era and gives color, point and focus to the film. "Look for the Silver Lining" also teaches something which it is important for people to know, namely, that culture comes from people and not from supernatural sources (R. 444). In other respects, the film shows the development from the episodic variety show and vaudeville, lacking any sort of unity and coherence, to the beginning of something that can be called drama with music in the more closely coordinated musical comedies of "Sunny" and "Sally" (R. 442). "Look for the Silver

Lining" indicates what is occurring and what is likely to occur in the future from the standpoint of historical perspective: That if we ever have real native opera in the country, it is likely to have its roots in the popular entertainment field of music rather than in external sources or European models (R. 443).

Music is primarily expressed through the human voice and the body. It is important for us to recognize that a dancer has something to say that is of cultural value. Jack Donahue as portrayed in the film, not only has something to communicate as a performing artist, but he also uses comedy as it has been used since the days of the ancient Greeks (R. 444). As a social commentary, it is a salutory influence in bringing wit and humor to bear on human frailties (R. 445). It helps to remind us that we are all amateurs in the business of living (R. 445).

In 1925, Professor Pitts recalls having seen Jack Donahue perform in "Sunny." In comparing that performance with Ray Bolger's dancing in "Look for the Silver Lining" she had difficulty realizing she wasn't seeing the same thing she saw in 1925 (R. 448). The spirit and feeling of the dancing of both Donahue and Bolger are the same (R. 463).

Dr. Mark May testified as follows:

He is Professor of Educational Psychology at Yale University, a member of the Connecticut State Board of Education, and of the American Council on Education. He also is Chairman of the United States Advisory Commission on Information, which is the citizens' commission which

works with the Department of State in respect to the Voice of America and other information sent overseas (R. 502). For fifteen years he has been Chairman of the Board of Directors of Teaching Film Custodians, Inc., a non-profit educational corporation of New York (R. 504).

The purpose of Teaching Film Custodians is to select and make available motion picture films for use for educational purposes. It utilizes films produced by the motion picture companies for the theatre (R. 514). It usually gets these films within from one to two years after their national release (R. 515). The twelve-man Board of Directors of Teaching Film Custodians consists of a list of the leading educators of the United States (R. 503-506). Selection of films is made by committees of teachers appointed by the National Educators' Conference. At present there are seven such committees, for example, a Committee on English, a Committee on Social Studies, and a Committee on Music. Professor Lilla Belle Pitts, who previously testified, is the Chairman of the Committee on Music. Each of the seven committees has the responsibility of selecting films which in its judgment have educational value in the teaching of the subject which that particular committee represents (R. 506). Teaching Film Custodians deposits its films in some nine hundred educational libraries located throughout the United States (R. 508). In Utah, deposits are located at the Bureau of Visual Education of the Salt Lake City Public Schools and at the University of Utah (R. 519). The films are available to any teacher for a nominal rental. Available films include both short subjects and excerpts from the so-called feature length films (R. 507).

Dr. May has seen "Look for the Silver Lining" and in his opinion the motion picture is definitely of educational and informative value (R. 509). This also was the opinion of the Music Committee, headed by Professor Pitts, which reviewed the film. That Committee expressed a desire for the film (R. 517-518), and therefore Teaching Film Custodians requested it from Warner Brothers. That Company has confirmed the fact that Teaching Film Custodians may have and use the film. The next step is the editing of the film by the Music Committee (R. 512; 517-518). It is the intent and desire of Teaching Film Custodians that this particular film be distributed along with its other educational films as soon as possible (R. 512).

Mr. Eric Haight testified as follows:

He is a director of Encyclopedia Britannica Films and President of its wholly owned subsidiary, Films, Inc. Encyclopedia Britannica Films is the leading producer of pedagogical films, sometimes referred to as documentary films, in the world (R. 521-522). Films, Inc. is the largest distributor of feature length films for use in educational purposes (R. 522). For many years the two organizations were independent, but they now have joined forces because it was felt that the two types of film complement each other and make it possible to offer a complete film program to American educational institutions (R. 523). The primary function of Films, Inc. is the distribution of feature films to schools, universities, and other educational groups (R. 523-524). Films, Inc. differs from Teaching Film Custodians in that the former uses the entire feature length film instead of just excerpts (R. 531). Usually, Films, Inc.

gets the feature films within six months of the national release date (R. 533).

Representatives of Films, Inc. have reviewed "Look for the Silver Lining" (R. 527-528). The film was considered by them to be suitable for use as an educational film and a request has been made for the film (R. 528). If the request is granted, Films, Inc., intends to distribute the film, without cutting (R. 531), to schools and educational institutions throughout the country (R. 535). In Utah, Films, Inc. distributes its feature films through the Deseret Book Company (R. 525). Much of the business done in Utah is with the Wards of the "Mormon" Church and therefore all the films deposited with the Deseret Book Company are first screened by the L. D. S. Screening Council (R. 525). "Look for the Silver Lining" has been screened by this Council and unanimously approved (R. 528).

The great interest in feature films in the educational field is due primarily to the fact that motion pictures have been found to be the most effective media of communication in dredging up the basic attitudes held by students. The adolescent becomes emotionally involved while witnessing a particular film and because of that involvement his basic attitudes and feelings are revealed. Frequently these attitudes and feelings prove to be a shocking surprise to the curriculum supervisor who has thought the student was learning something entirely different (R. 523). Another reason why the motion picture is such a forceful medium of communication is that when you look at it, without realizing, you tend to identify yourself with the

character portrayed and the action taking place on the screen. So that when a child comes out of these vicarious experiences, he frequently has changed behavior patterns and new attitudes towards social problems (R. 529). This has been forcefully demonstrated with such motion pictures as "Pinky" or "No Way Out" or "Gentlemen's Agreement." Unknowingly, after seeing pictures of this type, thousands of persons have rededicated themselves to the American way of life, because they have identified themselves with an experience of a very simple order in a motion picture (R. 530).

Mr. Haight was not paid for coming to to Salt Lake City to testify (R. 520). He came because it seemed shocking to him that it should be questioned whether the motion picture should be entitled to the same recognition and protection as a medium of communication and expression, as newspapers and books (R. 520; 539-540).

PRELIMINARY OBSERVATIONS

Before proceeding with the main points of defendants' argument, several preliminary observations should be made with respect to certain of the plaintiffs' contentions. At several points in their brief, the plaintiffs refer to what they consider to be inconsistencies in the trial court's rulings, particularly in comparing the trial court's instructions to the jury with its rulings on the declaratory judgment. In the light of the procedural history of the case, the action of the trial judge not only was understandably proper but probably exceedingly wise. As heretofore pointed out, when this case was in the federal courts, the Tenth

Circuit finally handed down a three to two decision in favor of the plaintiffs at the conclusion of its third hearing. Although the defendants were convinced that the views expressed in the majority opinion of the Tenth Circuit were incorrect, nevertheless these views constituted the only judicial expression that existed with respect to the construction of the Utah statute at the time of the trial in the state court. Since the opinion of the Tenth Circuit was concerned solely with the problem of construction of a state statute, it in no sense was controlling so far as the state courts of Utah were concerned. In the words of Mr. Justice Frankfurter, such decisions by federal courts involving the construction of state statutes in the light of constitutional considerations constitute nothing more than "preliminary guesses." *Spector Motor Service* v. *McLaughlin,* 323 U. S. 101, 65 S. Ct. 152; *Railroad Commission of Texas* v. *Pullman Co.,* 312 U. S. 496, 61 S. Ct. 643; *American Federation of Labor* v. *Watson,* 327 U. S. 582, 66 S. Ct. 761. Still, in the absence of any other authority, it naturally has some persuasive effect. And so in instructing the jury during the trial in the state court, the trial judge understandably adopted the views set forth in the Tenth Circuit's majority opinion with respect to the construction of the Utah statute, and submitted the issues in accordance with the theories therein outlined. In so doing, the trial court obviously chose to follow the most conservative course open to it. In fact, the parties somewhat anticipated this action by trying the case in the state court largely on the basis of the theories and assumptions previously announced by the majority of the Tenth Circuit.

In their motion for a directed verdict at the conclusion of all the evidence (R. 542-543) and in their requests for a declaratory judgment (R. 94-109), however, the defendants reiterated the arguments which the majority of the Tenth Circuit had rejected. By the time the case had reached the state court, these arguments had been greatly reinforced by the decision in *Burstyn* v. *Wilson,* 343 U. S. 495, 72 S. Ct. 777, decided subsequent to the opinion of the Tenth Circuit. The *Burstyn* case held for the first time that motion pictures, as such, were entitled to the constitutional protection of free speech and the press. But it was not until after the jury's "no cause of action" verdict and the declaratory judgment aspect of the case had been reached, that the trial court finally decided to adopt the defendants' contentions with respect to this phase of the law as it affected the construction of the Utah statute (R. 179). The conclusions of the trial court were arrived at only after full argument and mature consideration of the whole case in the light of the evidence and of the Supreme Court's recent pronouncement in *Burstyn* v. *Wilson, supra.*

It is true that the rulings of the trial court on the declaratory judgment are inconsistent with the legal theories and instructions on the basis of which the case was submitted to the jury. If the trial judge had adopted the views expressed in its declaratory judgment earlier in the case, it undoubtedly would have granted the defendants' motion for a directed verdict. Also, the trial court properly might have excluded as immaterial the abundant evidence introduced by the defendants as to the educational and informative value of the film. Out of an excess of

caution, however, the trial court resolved all doubts in favor of the plaintiffs and submitted the issues to the jury in accordance with the plaintiffs' theories of the law as contained in the majority opinion of the Tenth Circuit. As far as the damage phase of the lawsuit is concerned, the jury's verdict ends the matter. Under no conceivable circumstances could the plaintiffs hope for more than the trial court allowed them, that is, a submission of the issues to a jury in accordance with the majority opinion of the Tenth Circuit. The problem of construction of the Utah statute lingers on this appeal primarily because of the rulings of the trial court on the declaratory judgment.

At no time in this case have the plaintiffs raised any question as to the propriety of the defendants' counterclaims seeking a declaratory judgment. The Court may be interested to know, however, that ample authority for the requests for declaratory relief is found in *Gray* v. *Defa*, 103 Utah 339, 135 P. (2d) 251, 155 A. L. R. 495, annotated at 507-509, and *Altvater* v. *Freeman*, 319 U. S. 359, 63 S. Ct. 1115. In this important case, the plaintiffs and the defendants both are anxious to secure a definitive ruling from this Court with respect to the proper construction of the Utah law.

STATEMENT OF POINTS RELIED UPON

POINT I

THE UTAH STATUTE MUST BE CONSTRUED TO AVOID AN UNCONSTITUTIONAL RESULT.

POINT II

THE STATUTORY PROHIBITION AGAINST USES "FOR ADVERTISING PURPOSES OR FOR PURPOSES OF TRADE" DOES NOT APPLY TO THE EXHIBITION OF MOTION PICTURES.

POINT III

THE ERRATIC AND DECADENT FORMULA DEVISED BY THE NEW YORK COURTS IS INAPPLICABLE TO THE PRESENT CASE.

POINT IV

THE UTAH STATUTE IS A CODIFICATION OF A LIMITED RIGHT OF PRIVACY—PERSONAL IN NATURE.

POINT V

THE UTAH CONFLICT OF LAWS RULE REQUIRES PLAINTIFFS' SUBSTANTIVE RIGHTS TO BE DETERMINED BY THE LAW OF CALIFORNIA.

ARGUMENT

POINT I

THE UTAH STATUTE MUST BE CONSTRUED TO AVOID AN UNCONSTITUTIONAL RESULT.

In their amended complaint (R. 47-51), on the basis of which the trial proceeded in the state court, the plaintiffs

asked that all future exhibitions by the defendants of the motion picture "Look for the Silver Lining" be enjoined, also for general and exemplary damages for all past exhibitions, because of the fact that their written consent had not been first obtained to use the name of Jack Donahue in the film. This extraordinary claim to the power of life or death over the exhibition of a motion picture film is allegedly derived from the provisions of Sections 103-4-8 and 103-4-9 of the *Utah Code Anno.* (1943). According to plaintiffs, the statute confers upon them absolute and unrestrained authority to prohibit, in any theatre where an admission is charged, the exhibition of any motion picture which uses the name, portrait or picture of their deceased ancestor, without their prior written permission.

Throughout the proceedings in this case, the defendants consistently have maintained that any such interpretation of the state statute would constitute a prior restraint on the freedom of expression expressly guaranteed by the state and federal constitutions, and necessarily would render the statute invalid.

At the time this argument was presented to the United States Court of Appeals, Tenth Circuit, and the opinion of that Court was announced, there existed no definitive holding that motion pictures were entitled to the constitutional protection of free speech and press. In fact, except for dictum in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166, 68 S. Ct. 915, 933, the existing authorities were to the contrary. *Mutual Film Corp.* v. *Industrial Comm. of Ohio,* 236 U. S. 230, 35 S. Ct. 387, and *Burstyn* v. *Wilson,* 303 N. Y. 242, 101 N. E. (2d) 665.

Notwithstanding these precedents, however, the Tenth Circuit in part at least did accept the defendants' contention. The majority held that the state statute would constitute an objectionable restraint upon the freedom of speech and the press to the extent that it forbade the publication or exhibition of a motion picture which was essentially educational or informative or purely biographical in nature (194 F. (2d) 13). But on the basis of the particular allegations in the plaintiffs' amended complaint, the Tenth Circuit concluded that it could not say as a matter of law whether "Look for the Silver Lining" was sufficiently educational or informative or biographical to come within the constitutional protection as thus defined. According to the Tenth Circuit's definition, only publications of an essentially educational or informative or purely biographical character came within the aegis of the First and Fourteenth Amendments.

The decision of the Tenth Circuit indicated that the issue of whether a particular motion picture was educational or informative or biographical had to be determined in each case as an issue of fact. So, at the trial in the state court, the trial judge submitted that issue to the jury, even though the evidence introduced by the defendants as to the educational and informative value of the film was uncontradicted (R. 368-541). In its Instruction No. 3, the trial court told the jury it must find that the motion picture "is essentially educational or informative in character" before it could conclude that the film came within the constitutional exemption (R. 156; 548). Plaintiffs' only exception to this instruction was based upon lack of evidence to

justify it, not that it improperly stated the law (R. 560). In view of the verdict, it must be presumed that the jury found as a fact that "Look for the Silver Lining" was essentially educational and informative. So far as the plaintiffs' complaint for damages is concerned, this finding is dispositive of the case.

The problem continues here by virtue of the defendants' counterclaims for a declaratory judgment with respect to their future right to exhibit and re-exhibit in Utah "Look for the Silver Lining" also other and similar type motion pictures containing both factual and fictional portrayals of deceased public figures such as Jack Donahue, without the prior consent of the heirs (R. 95, 101, 106). In this connection, the defendants make the contention that the portrayal of a prominent deceased public figure such as Jack Donahue is protected by the constitutional guarantees of free speech and press, without the necessity of an evaluation by a jury of the specific educational or informative or biographical character of each film. In other words, the defendants' position is that the constitutional protection is substantially broader than that recognized by the Tenth Circuit for only essentially educational or informative or purely biographical publications.

Perhaps some excuse for the Tenth Circuit's narrow definition of the scope of free expression may have existed at the time of its majority opinion, but all doubts were swept aside by the United States Supreme Court when it reversed the ruling of the New York Court of Appeals in *Burstyn* v. *Wilson,* 343 U. S. 495, 72 S. Ct. 777, and in the same opinion discarded the vestigial remnants of *Mutual*

Film Corporation v. *Industrial Commission of Ohio*, supra. In the *Burstyn* decision, the Supreme Court said:

> "* * * [T]he present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment through the Fourteenth, secures to any form of speech or the press.
>
> "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters* v. *People of State of New York*, 333 U. S. 507, 510, 68 S. Ct. 665, 667.
>
> > 'The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.'
>
> "It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression, whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.
>
> "It is further urged that motion pictures possess a greater capacity for evil, particularly among

the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

"For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film Corporation* v. *Industrial Commission, supra,* is out of harmony with the views here set forth we no longer adhere to it.

* * * * *

"The statute [of New York] involved here * * * requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringment upon freedom of expression to be especially condemned. *Near* v. *State of Minnesota ex rel. Olson,* 283 U. S. 697, 51 S. Ct. 625. * * *"

The factual situation involved in the *Burstyn* case is interesting. It concerned the exhibition in the State of New York of the film entitled "The Miracle" produced in Italy by Roberto Rossellini. The story involved a demented young girl who was a goat-tender. One day she was approached by a bearded stranger whom she fancied to be St. Joseph. After plying her with wine, the stranger ravished her. Thereafter the girl returned to her village and discovered

her pregnancy, which she decided was due to the "Grace of God." She was persecuted and shamed by the villagers. Finally, after many hardships and great pain her baby was born. The experience filled her with joy and tender light.

The story thus portrayed was regarded by many as a parody of the biblical account of the immaculate conception. It created great controversy and a plethora of favorable and unfavorable comments among religious groups. Finally the Board of Regents of the Educational Department prohibited further exhibitions of the film on the ground that it was "sacrilegious." The action was based upon a state statute which permitted the Board to ban any film considered "obscene, indecent, immoral, inhuman, sacrilegious, or of such a character that its exhibition would tend to corrupt morals or incite to crime * * *." In reversing the decision of the New York Court of Appeals, the Supreme Court held the statute invalid, stating that it created a censorship constituting an infringement of freedom of expression to be especially condemned. *Gelling* v. *Texas,* 343 U. S. 960, 72 S. Ct. 1002, reached a similar result. There a local Board of Censors of the City of Marshall, Texas, had denied permission for the exhibition of a motion picture on the authority of an ordinance permitting such action when the Board was of the opinion that the picture was "of such character as to be prejudicial to the best interests of the people of said city." On the authority of *Burstyn,* the Supreme Court held the ordinance invalid as a prior restraint on freedom of expression.

It is respectfully submitted that the type of censorship so emphatically condemned in *Burstyn* and *Gelling*

is indistinguishable from that imposed by an interpretation of the Utah statute in the manner claimed by plaintiffs in this case. According to plaintiffs, the Utah statute authorizes the absolute prohibition of all exhibitions of any motion picture containing a portrayal of any deceased relative, on the mere whim of the heirs' consent. Any exhibition without such prior permission would render the exhibitor liable to punitive damages and guilty of a criminal offense. As thus interpreted, the statute not only vests unlimited powers of censorship in a vague and nebulous group denominated as "heirs," but it creates an effective prior restraint against any portrayal through speech or the press of any deceased person. It is inconceivable that the Utah legislature intended such a result.

In the light of the *Burstyn* and the *Gelling* cases, it is impossible to accept the narrow definition of the scope of the constitutional guarantees set forth in the majority opinion of the Tenth Circuit. *Burstyn* makes clear that the rule of free expression protects not just educational or informative material, but also material deemed by many to be "sacrilegious." It protects not only expressions of political and social doctrine, but also "the subtle shaping of thought which characterizes all artistic expression." It protects not only biography, but also fiction. It protects not only material which informs, but also material which entertains and is conducted for profit. It protects not only high class literature, but also salacious publications in which the Supreme Court could see nothing of any possible value to society (*Winters* v. *People of State of New York*, 333 U. S.

507, 68 S. Ct. 665). It protects not only expressions of a high moral tone, but also material which possesses a "capacity for evil, particularly among the youth of a community."

In their brief, the plaintiffs seek to escape the force of the *Burstyn* decision by arguing that "Look for the Silver Lining" is interdicted by the Utah statute because it was exhibited for box office profits. Because of this, say the plaintiffs, the constitutional provisions have no application. The difficulty with this argument is that it was expressly considered and rejected by *Burstyn*. The Supreme Court stated:

> "It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression, whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures."

Plaintiffs also urge that because a motion picture is fictionalized and used for entertainment it falls outside of the pertinent constitutional provisions. This argument likewise was considered and rejected in *Burstyn*, not only because the story of the "Miracle" film is itself fictional but also by reference to the Court's earlier decision in *Winters* v. *People of State of New York, supra.* In the latter case, the Supreme Court considered and declared invalid a state statute under which a bookdealer was convicted of selling magazines containing vulgar stories of crime, blood-

shed and lust. The Court held that even publications of such a cheap and fictional nature were entitled to the constitutional protection, stating:

> "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another's doctrines. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

One of the basic irrationalities of the plaintiffs' fact-fiction dichotomy in its relationship to free expression is its false assumption that all matter which is not absolutely factual is of no value to the public. The inaccuracy of such an assumption is indicated in *Hannegan* v. *Esquire*, 327 U. S. 146, 157-158, 66 S. Ct. 456, 462, where the Supreme Court in a case concerning free press and mail classification stated: "What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. * * * From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values."

It is not here urged that there are no limits to the constitutional protection of free speech and press. But the limits are well defined and narrowly limited. As stated in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572, 62 S. Ct. 766, 769, these limitations include "the lewd and ob-

scene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." And in recent times, these limitations have been said to include communications of such serious and substantial evil as to endanger or threaten the overthrow of the government by force. *Dennis* v. *United States,* 341 U. S. 494, 71 S. Ct. 857. The Supreme Court also has refused to extend the constitutional protection to the distribution in the streets of purely commercial advertising handbills. *Valentine* v. *Christensen,* 316 U. S. 52, 62 S. Ct. 920. But freedom of expression is the rule, not the exception. Only in exceptional situations have the limitations been recognized. In the light of the First Amendment's history and of the decision in *Near* v. *State of Minnesota,* 283 U. S. 697, 51 S. Ct. 625, anyone claiming a limitation to the rule of freedom of expression has a heavy burden to demonstrate that the limitation asserted presents a really exceptional case. So far as the unrestricted prohibition claimed for the Utah statute in the present case, it is far from the kind of narrow exception to freedom of expression which a state properly may carve out to satisfy the adverse demands of other interests of society. In the words of Chief Justice Hughes in the *Near* case: "The fact that the liberty of the press may be abused * * * does not make any the less necessary the immunity of the press from previous restraint * * *." And state statutes restricting expression, even when justified by an actual danger, must be narrowly drawn and not broader than necessary to meet the recognized evil. *Feiner* v. *New York,* 340 U. S. 315, 320, 71 S. Ct. 303, 306; *Nie-*

motko v. *Maryland,* 340 U. S. 268, 271-272, 71 S. Ct. 325, 327; *Cantwell* v. *Connecticut,* 310 U. S. 206, 307-8, 60 S. Ct. 900, 905.

The prior restraint and unbridled censorship imposed by the Utah statute (if construed as plaintiffs contend) is brought to special focus when applied, as in the present case, to fictional publications concerning deceased public figures. If the statute should be construed as prohibiting the fictional portrayal of deceased public figures the practical, every day results of such a construction would be disastrous to the cultural and intellectual life of the people of Utah. Necessarily the statute would have to be regarded as a previous and unreasonable restraint on the freedoms of speech and the press provided by the state and federal constitutions.

Since time immemorial, the portrayal of the famous dead in fictional as well as factual form has been an essential part of our culture and one of the most vital and important forms of free expression. It must be remembered that our culture is a product of the generations that have gone before us—of those who are now dead. Accordingly, thinking and writing about the dead represent a great and substantial part of our culture. Science, to a large extent, is the work of those who have preceded us. History and religion are essentially the story and the experiences of those who have lived before us. Law and philosophy are largely the work of men who are long dead. The greatest and most precious part of our literature and of our art are the creations of bygone generations. It is in these forms—science, history, law, philosophy, literature, art—that our

culture expresses itself. Thus our culture *necessarily* deals with the works and careers of the dead—particularly the *famous dead.** In so dealing with the famous dead and their works, we may deal with them factually, as in science, history, law and philosophy. However, in literature and the arts—the graphic as well as the literary arts—we deal with the dead not only factually but also fictionally, not only in actuality but also in the imagination. Both factual and fictional publications concerning the noted figures who have gone before us are an essential part of our culture, and the unrestrained right to continue such publications is necessary for the survival of that culture in the form in which we now know it.

Practically all jurisdictions which have given recognition to a common law right of privacy have taken pains to emphasize that the right does not extend to publications concerning public figures. As set forth in the *Restatement, Torts,* Section 867, Comment (c), such persons necessarily are "subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims." *Corliss* v. *Walker,* 64 Fed. 280, 282; *Pavesich* v. *New England Life Ins. Co.,* 122 Ga. 190, 200, 50 S. E. 68, 72; *Cohen* v. *Marx,* 94 Cal. App. (2d) 704, 211 P. (2d) 320; *The Right to Privacy,* 4 *Harv. L. Rev.* 193, 215 (Warren and Brandeis, the creators of the right of privacy expressly recognized the public figure concept as an excep-

*In a recent issue of the Saturday Review of Literature (October 27, 1951) there is a leading article by R. R. Spencer, M. D., entitled "Staying Alive," in which it is stated (p. 42):

> "Man is the 'knowledged ape,' the only talking animal, the only tool-maker, the only time-binder; that is, the only animal capable of binding into his own experience the experiences and wisdom of those who lived in times long past."

tion to the right). What is true of living figures within the public eye is even more true of the famous dead.

If the plaintiffs' contention concerning the construction of the Utah statute should prevail, the cultural blight that would descend upon the State of Utah would be too grim to contemplate. It would mean that no plays, novels, paintings and other forms of artistic expression, which contain any fictional reference to a famous deceased person, could be published in Utah without the previous written permission of the deceased's heirs. The practical effect of such a prohibition would be to stifle the cultural life of the community. The custom of portraying famous deceased persons in works of fiction and in fictional situations is at least as old as the ancient Greek theatre. It is found, for example, in the plays of Aeschylus and Aristophanes in which famous personalities, then but recently deceased, were portrayed under their own names in fictional situations. A work as celebrated as Plato's *Dialogues* is essentially the portrayal in fictional situations of the then recently deceased famous personality of Socrates. Another striking example is the depiction, under their own names, but in fictional scenes, of famous deceased persons in Dante's *Divine Comedy.* Shakespeare too, followed this custom. The roster of the famous dead who, under their own names, perform their fictional roles in Shakepeare's works, begins with such remote figures as Julius Caesar and ends with Henry VIII, who, in Shakespeare's time was practically a contemporary figure.

In modern times portraying deceased public figures fictionally is one of the most common forms of artistic ex-

pression in the novel, the drama, in paintings, and in motion pictures. It would be difficult to name a famous figure of ancient, medieval or modern times who has not been portrayed fictionally in such a work. In Appendix A attached to this brief is a list of titles of a few of the motion pictures, plays, and novels in which the famous dead have been portrayed fictionally. In Appendix B are set forth excerpts from two distinguished works: (a) *A Guide to the Best Historical Novels and Tales* by Jonathan Nield (Elkin Matthews & Marrot, London 1929), and (b) *A Guide to Historical Fiction* by Ernest A. Baker, M.A., D. Lit. (The MacMillan Company, New York 1914). These extracts contain the views of Carlyle, Lord Morley, Charles Reade and Henry Seidel Canby on the significance of the historical novel in which the famous dead make their fictional appearances. These extracts also contain the considered views of two such distinguished students of literature as Mr. Jonathan Nield and Dr. Ernest A. Baker, concerning the significance and value to our culture of publications in which famous dead people are recreated in fictional situations. The clarity with which their views are expressed and the acuteness of perception which these learned scholars have brought to this particular subject cannot possibly be improved upon. Probably no better exposition exists concerning the cultural importance of publications in which the famous dead are fictionally portrayed.

Most of the works listed in Appendix A and thousands of others like them have been published, produced or performed in one form or another in the State of Utah. But if the construction of the Utah statute for which the plain-

tiffs contend were allowed, the potential liabilities and damage suits created thereby would be literally incalculable. How many thousands of heirs of the famous dead would be able to bring suit for how many millions of dollars, because someone had published, produced or exhibited in Utah, some fictional work dealing with a famous deceased person? Plainly, the situation which the plaintiffs propose would be an impossible one. In Colorado, Wyoming, Idaho and Nevada (and for that matter in the rest of the United States) such publications would be a desirable part of the community culture. But in Utah, publication of such works would render the publishers and exhibitors guilty of a criminal offense and subject to unlimited liability in punitive damages. In a very literal sense, Utah would become as a "cultural desert."

The consequences of the plaintiffs' proposed construction of the Utah statute are strikingly illustrated by Chief Judge Phillips of the Tenth Circuit by the reference in his dissenting opinion to the well known novel *The Soul of Ann Rutledge,* by Bernie Babcock. This book depicts the romance of Abraham Lincoln and Ann Rutledge and the affect that the untimely death of Ann Rutledge had upon the molding of Lincoln's character. In connection with this book, eminent Lincoln historians are divided in their opinions concerning the authenticity or significance of the theory propounded in this book. Some believe that the romance of Lincoln and Ann Rutledge occurred historically approximately as represented in the book. While others believe that the story of the relationship between Lincoln and Ann Rutledge to be purely fictional and hardly more than a myth

or a "lie."* But who is to determine whether this fine novel is or is not "informative and educational" or that it contains "fiction and untruths" and therefore ought to be suppressed in the State of Utah? Certainly not the "heirs" of Abraham Lincoln, and certainly not the "heirs" of Ann Rutledge.

As Carlyle has said (Appendix B hereof), the historical novels "have taught all men this truth * * * that the bygone ages of the world were actually filled by living men, not by * * * abstractions of men." Accordingly, a "work of fiction * * * gives the historical student a bird's-eye view where previously his sight has been obstructed by details," and in the words of Henry Seidel Canby, "fiction and history are interchangeable." This, it is submitted, is the answer to plaintiffs' attack on fictional expressions of speech and the press, whether contained in *The Soul of Ann Rutledge* or in *Look for the Silver Lining*

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*Writers Who Accept the Ann Rutledge Part of the Lincoln Story

Carl Sandburg: Abraham Lincoln The Prairie Years—*Robert E. Sherwood:* Abe Lincoln In Illinois—*E. P. Conkle:* Prologue to Glory—*Nicolay & Hay:* Abraham Lincoln—*Nathaniel W. Stephenson:* Lincoln—*Ward H. Lamon:* The Life of Abraham Lincoln—*Edgar Lee Masters:* Ann Rutledge in Spoon River Anthology—*Bernie Babcock:* The Soul of Ann Rutledge—*Irving Bacheller:* A Man For The Ages—*D. J. Snider:* Lincoln and Ann Rutledge—*H. W. Gammans:* Spirit of Ann Rutledge—*Lloyd Lewis:* New Light on Lincoln's Only Romance (New York Times Book Review) Feb. 11, 1945—*T. Morris Longstreth:* Tad Lincoln—*William H. Herndon & Jesse W. Weik:* Herndon's Lincoln—*Wilma Francis Minor:* Lincoln The Lover (Atlantic Monthly, issues Dec. 1928 to Feb. 1929).

Writers Who Reject or Doubt the Ann Rutledge Part of the Lincoln Story

Montgomery S. Lewis: Legends That Libel Lincoln—*Emanuel Hertz:* The Hidden Lincoln—*Josiah G. Holland:* The Life of Abraham Lincoln—*James G. Randall:* Lincoln The President—*Albert J. Beveridge:* Abraham Lincoln 1809-1858—*Paul M. Angle:* A Shelf Of Lincoln Books—*Roy P. Basler:* The Lincoln Legend—*Encyclopaedia Britannica,* 14th Edition under "Abraham Lincoln" page 139.

or in any fictional work in which deceased public figures are portrayed.

Moreover, under plaintiffs' contention that a deceased public figure may not be portrayed with any degree of fictionalization, what is to be done about most of the famous paintings of American history? Take for example Emanuel Leutze's "Washington Crossing the Delaware." Concerning this picture, it is stated in *The History & Ideals of American Art,* by Eugen Neuhaus, Professor of Art in the University of California (Stanford University Press, 1931), at page 141:

> "Much has been written and said regarding the picture on the question of its historical veracity. The charges that it was painted abroad and that the shores of the picture are not those of the Delaware but those of the Rhine are all petty criticisms which cannot discount the fact that the picture is an excellent academic composition, admirably balanced, possessed of much dignity, and full of a spirit of adventure. Its theatrical qualities are undesirable, but they are found in most synthetic pictures."

With respect to this picture, it is stated at page 144 of volume 1 of *Life in America,* infra, that although it is "false in almost every detail [it] has become the accepted symbol of the event." According to plaintiffs, however, this most famous of all American historical paintings, being obviously a "fictional" work, must be suppressed, or else henceforth in the State of Utah the exhibition or sale of copies of it must be subject to the prior written consent of the heirs of George Washington.

Almost everyone is familiar with the numerous paintings portraying one of the saddest moments in American history, *Custer's Last Stand.* Such pictures, it happens, are all "fictional." Not one of them can be said to be either authentic or factual. On this subject *Life Magazine,* in its issue of June 21, 1948 had the following to say:

> "Few battles before or since have inspired so much controversy or so much bad art. Because the only survivor of Custer's detachment was a wounded horse * * * artists have let their imaginations run wild. Nine samples of their work, good and bad, are reproduced here. Custer is variously shown fighting with one pistol, two pistols * * * afoot and on horseback * * * The latest and artiest painting * * * is the work of Thomas Benton (next page), who said he did it because he got tired of the saloon versions."

Under plaintiffs' contention, however, the sale of pictures of *Custer's Last Stand* is illegal in the State of Utah.

In a review (written by the distinguished American critic, Bernard DeVoto) of the recently published two-volume history of the United States, in text and pictures, entitled *Life in America,* by Marshall B. Davidson (Houghton Mifflin Company, in association with the Metropolitan Museum of Art, Boston, 1951), appearing in the Book Section of the New York Herald Tribune of Sunday, October 21, 1951, it is stated:

> "It is striking that a picture may be factually false but historically true nevertheless. Thus, a famous drawing from Champlain's 'Voyages' which shows the explorer shooting Iroquois on behalf of his Algonquin allies is absurd and erroneous in all

its details, but it so truly presents the situation, the conditions, and the implications of one of the most decisive events of the Seventeenth Century that to see it is to understand them clearly and justly. The idealizations, symbolisms, and sentimentalities of popular belief become an immensely useful means of historial interpretation. Caleb Bingham's 'Daniel Boone' is a mythological picture, but it is at the very heart of sentiments about the frontier whose importance in the westward movement could not be overstated. Such pictures repeatedly express the emotion, the illusion, and the hope for, or the mirage which produced human actions and which must be felt if the actions are to be understood."

Would plaintiffs seriously contend that the exhibition and sale of historical pictures which are "factually false," like the above pictures of Champlain and Daniel Boone, are illegal in the State of Utah? Would plaintiffs seriously contend that the sale of the book *Life in America* is illegal in Utah because it reproduces such pictures? Would plaintiffs seriously contend that it is illegal to distribute in the State of Utah the issues of *Life Magazine* referred to above because in them are reproduced fictional representations of famous deceased persons?

In light of the disastrous consequences of plaintiffs' construction of the Utah statute is it possible to argue that they have "ethical sanction?" That they are "defensible in morals?" These questions are asked because the New York Court of Appeals in holding the New York privacy statute constitutional *(Rhodes* v. *Sperry & Hutchinson Co.*, 193 N. Y. 223, 85 N. E. 1097, aff. 220 U. S. 502, 31 S. Ct. 490), did so on the ground that the restraint thereby imposed

upon the use of names and portraits of living persons in the form of advertisement or trade notices had "ethical sanction," and that the abuse eliminated was "indefensible in morals." The New York statute had a history. It was enacted to correct an existing wrong at the suggestion of the highest court of the state, which was shocked by the discovery that the law afforded no protection against the use of a person's picture to promote the sale of a brand of flour. *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442. And so in *Rhodes* v. *Sperry & Hutchinson Co.*, supra, the Court referred to the history of the statute and explained the "ethical" and "moral" sanctions which persuaded it to accept as reasonable the limitation imposed, in the face of the constitutional objections advanced, stating:

> "The power of the legislature in the absence of any constitutional restriction to declare that a particular act shall constitute a crime or be actionable as a tort cannot be questioned where the right established or recognized and sought to be protected is based upon an *ethical sanction.* * * * There was a natural and widespread feeling that such use of * * * [names and portraits for advertising purposes] in the absence of consent was *indefensible in morals* and ought to be prevented by law. Hence the enactment of this statute." (Italics supplied.)

But what history is there behind that part of the Utah privacy statute which plaintiffs contend prevents the use of the names and pictures of the famous dead in connection with publications which clearly are a part of the free speech and the press of the country? What existing wrong was that part of the statute intended to correct? The defendants have

been unable to find any such history, nor any such wrong. On the contrary, that part of the Utah statute, if construed in the manner that ~~defendants~~ Plaintiffs here advocate, not only would not correct any existing wrong, but would instead create new wrongs, and as has been shown, would hobble culture, shackle art and restrain creative expression. The following language from *Colyer* v. *Richard K. Fox Publishing Co.*, 162 App. Div. 297, 146 N. Y. S. 999, 1001, with reference to the New York statute is appropriate:

> "When the statute was enacted originally in 1903, the custom of publishing in papers the portraits of individuals who were distinguished in their activities of life was very general. If the legislature had intended to wipe out this custom, it could have said so easily in positive language. It did not so say in terms, and the courts have proceeded to give the statute full enforcement, within the meaning of its express provisions, considered in the light of its history."

Similarly, if the Utah "legislature had intended to wipe out this custom," i.e., the custom of creating and producing works of the imagination in which deceased public figures are portrayed fictionally, "it could have said so easily in positive language. It did not say so in terms." It is submitted, therefore, that this Court should not give the Utah statute a construction which would wipe out this essential custom.

Briefly to summarize: Before the enactment of the statute here involved, the citizens of Utah had the unquestioned right: (a) To deal with deceased public figures *factually*, and (b) to deal with deceased public figures *fic-*

tionally. It is beyond dispute that any statute which presumed to take away right (a) would constitute an abridgement of the constitutional guarantees of free speech and the press. So also, it is submitted, with respect to any statute which imposed a restraint upon right (b), that is, the right to deal fictionally with deceased public figures. As herein demonstrated, the right to deal fictionally with deceased public figures is an ancient and basic part of our cultural heritage. Without such right, our civilization and our culture would be seriously impaired. Any interference with that right is, therefore, an unreasonable as well as a previous restraint on freedom of expression. Such a restraint cannot be justified on the basis of any distinction between a factual and a fictional portrayal of a deceased public figure. The United States Supreme Court in the *Burstyn, Winters* and *Hannegan* cases has made clear that works of fiction and entertainment are protected by the constitutional guarantees of free speech and the press, just as much as works of a purely factual character. Consequently, under the ruling of these cases, it would be as unreasonable to prohibit a publication dealing with a deceased public figure fictionally as it would be to prohibit a publication dealing with a deceased public figure factually. Furthermore, the mere fact that a motion picture is involved cannot justify the restraint. *Burstyn* v. *Wilson, supra.*

It is evident that if the plaintiffs' construction of the Utah statute were accepted, an unreasonable and previous restraint of the freedom of speech and the press would be effected. The question then presents itself as to how the statute should be construed to avoid this result. The obvious

answer is to give it the common sense construction of holding it inapplicable to motion pictures or other media of communication within the ambit of free speech and the press. By its own language, the statute applies only to uses "for advertising purposes or for purposes of trade." For reasons hereinafter set forth, it clearly was not the legislative intent to include subjects of free speech and press within the ban applicable to advertising or trade materials.

As stated, the implications of the *Burstyn* case finally were adopted by the trial court in its rulings on the defenddants' counterclaims for declaratory relief. In paragraphs 2 and 3 of the declaratory judgment, the trial court held that in view of the provisions of the state and federal constitutions, Sections 103-4-8 and 103-4-9 of the *Utah Code Anno.* (1943) were not applicable to the distribution or exhibition of motion picture films containing factual or fictional portrayals of a deceased public figure such as Jack Donahue (R. 179-180). An affirmance of this ruling would make unnecessary the consideration of any of the other questions raised on this appeal.

POINT II

THE STATUTORY PROHIBITION AGAINST USES "FOR ADVERTISING PURPOSES OR FOR PURPOSES OF TRADE" DOES NOT APPLY TO THE EXHIBITION OF MOTION PICTURES.

Sections 103-4-8 and 103-4-9 of the *Utah Code Anno.* (1943) require the prior written permission of the heirs

in order to use the name, portrait or picture of a deceased person, only if the use is "for advertising purposes or for purposes of trade." As heretofore suggested, if the statute were held to be inapplicable to the distribution and exhibition of motion pictures or other media of free speech and the press, the constitutional problem with respect to the statute's construction resolves itself. In addition, as herein demonstrated, such a construction of the statute would be in accordance with both legislative intent and judicial authority as well as the evidentiary facts of the present case.

The Utah statute was enacted in 1909. Except in respect of its treatment of deceased persons, it is substantially identical to the New York statute passed in 1903 (Laws of 1903, Chap. 132). The New York law was enacted primarily in response to a suggestion contained in an opinion handed down the previous year by the New York Court of Appeals in *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442. In that case, a milling company had appropriated without permission the photograph of the plaintiff, a pretty young woman, and had used it to advertise a brand of flour. The advertisement, which was widely distributed, consisted of a photograph of the plaintiff above the caption "Flour of the Family" together with other representations concerning the milling company and its product. The Court of Appeals held that in the absence of a statute, the plaintiff was without remedy and it suggested appropriate legislation. In response, Sections 50 and 51 of the New York Civil Rights Code was enacted by the next session of the Legislature. In *Rhodes* v. *Sperry &*

Hutchinson Co., 193 N. Y. 223, 85 N. E. 1097, aff. 220 U. S. 502, the Court of Appeals of New York traced the history of the enactment, the motives which prompted it, and the nature of the right granted, stating:

> "* * * Such is the character of the right of privacy preserved by legislation protecting persons against the unauthorized use of their name or portraits in the *form of advertisement or trade notices.* It is a recognition by the lawmaking power of the very general sentiment which prevailed throughout the community against permitting advertisers to promote the sale of their wares by this method, regardless of the wishes of the persons thereby affected." [Italics supplied.]

The New York statute employs the same phraseology "for advertising purposes or for purposes of trade" as appears in the Utah statute. The particular type of wrong which the New York Legislature intended to correct is evident. It intended to prohibit the use of personalized advertising material of the type involved in the *Roberson* case, without the written consent of the person involved. So far as the New York Legislature was concerned "for advertising purposes or for purposes of trade" meant using the picture of a pretty girl to advertise a brand of flour. When the Utah Legislature passed substantially the same statute in 1909 and used the same terminology, it is reasonable to assume that it intended to prohibit the same kind of advertising and trade materials, and to remedy the same type of wrong. Obviously the term "trade" was used in the sense that denotes barter, purchase, or sale of goods, wares or merchandise, and refers to the unauthorized use of an

attribute of personality such as a name, picture or portrait to promote the sale of a collateral commodity.

In 1903 and 1909, motion pictures as they are known today did not exist. The first talking picture was not produced until 1926. "Motion Pictures and The First Amendment" 60 *Yale L. J.* 696. The concept of motion pictures as a media of communication did not emerge until many years later. See footnote 10 of *Burstyn* v. *Wilson, supra.* It is unlikely that either the New York or the Utah Legislatures gave any consideration to the problem of whether motion pictures constituted "advertising or trade." Undoubtedly the Legislatures did consider and did intend to exclude from the ban of the statute, subjects which at that time were traditionally recognized as part of the free speech and press of the country. Otherwise, why should the Legislatures have confined themselves to the narrow terminology of "advertising purposes or for purposes of trade." If more than the type of situation involved in the *Roberson* case had been intended, surely language of a more inclusive character would have been employed. As aptly stated on page 40 of plaintiffs' brief, "it should clearly appear from the enactment itself that an activity was covered by clear and decisive words or the court should not bring it in by judicial construction of doubtful words."

The decisions of this Court in cases involving similar statutes in which the term "trade" appears, likewise support the view that motion picture exhibitions are not included within the commonly accepted definition of that term. *Paramor Theatre Co.* v. *Trade Commission,* 95 Utah 354, 81 P. (2d) 639; *Beard* v. *Board of Education,* 81 Utah

51, 16 P. (2d) 900. In the *Paramor Theatre* case, the question presented was "whether the operation of moving picture theatres and exhibition of films" constitute "trade or commerce" within the meaning of the statute defining the jurisdiction of the Utah Trade Commission. After a consideration of many authorities, this Court concluded that theatrical exhibitions, although carried on for money, should not be classified as "trade or commerce" in the commonly accepted meaning of those words. The Court said that if it had been the intention to give the words a different or broader meaning, "the legislative enactment should by clear and decisive words indicate the intent so to do," rather than to leave the matter "to depend on a judicial construction of doubtful words." So too, in *Beard* v. *Board of Education, supra,* this Court held that the exhibition of motion pictures and theatrical performances as part of the extra-curricular activity of the schools was not "trade or commerce" within the intent of a statute providing that school buildings could not be used for "commercial purposes."

The definition of "trade" contained in the *Paramor Theatre* case is in accord with the undisputed evidence adduced during the trial of the case at bar. Professor Eaton, a distinguished drama critic and teacher of playwriting, testified that the creation and exhibition of a play or motion picture is not regarded as a matter of "trade" by authors, critics or anyone else familiar with the drama (R. 485). The object of trade, according to Professor Eaton, is something like Campbell's soup which is produced over and over again (R. 489), as distinguished from the production and exhibition of a play or a motion picture which

represents a unique artistic accomplishment (R. 487). As illustrative of this distinction, reference was made to the product known as Prince Albert Tobacco. A picture of Prince Albert in his whiskers and long frock coat is stamped on each can (R. 488). Such use of a historical character in promotion of the sale of a product is clearly for purposes of trade and advertising. In contrast, the play "Victoria Regina" depicted Prince Albert with the same whiskers and frock coat. It is certain that the creators and producers of "Victoria Regina" did not regard themselves as engaging in "trade" (R. 489). In the scrapbooks, Exhibits 1 to 8, produced by Mrs. Donahue at the trial, there appear numerous advertisements of the beverage "Moxie" also of Bulova watches and similar products, in which the name and picture of Jack Donahue were used along with other advertising material (Exhibit 2). Although the record is silent as to whether Jack Donahue's permission was obtained in connection with these purely commercial broadsides, they clearly represent a use of his name and picture "for advertising purposes or for purposes of trade." On the other hand, Jack Donahue was both an author and the star of the musical show "Sons O'Guns" (R. 222). It is unlikely that he considered either his play or his performance therein as a matter of "trade."

As stated, the legislative history, the rules of statutory construction and judicial precedents, as well as the evidence adduced at the trial, all point to the conclusion that motion pictures, plays, novels and similar achievements of creative art are not "advertising or trade" within the intent or meaning of those words as used in the Utah statute.

When the United States Court of Appeals, Tenth Circuit, considered this case, it defined "advertising or trade" as including the distribution or exhibition of a motion picture "based primarily upon fiction or the imagination and designed primarily to entertain and amuse an audience desiring entertainment and willing to pay therefor" (194 F. (2d) 12). Again, as it did in connection with the issue of whether "Look for the Silver Lining" was essentially educational or informative or purely biographical, the Tenth Circuit said that on the basis of the allegations of the amended complaint it could not say as a matter of law whether the motion picture constituted "trade" within its own particular definition of that term. The effect of this ruling was to leave the issue to be determined as one of fact. And so, at the trial in the state court, the trial judge told the jury in its Instructions No. 3 and No. 6, that if the motion picture was "based essentially upon fiction or the imaginative and designed primarily to entertain and amuse an audience desiring entertainment, then your verdict should be for the plaintiffs and you should proceed to assess the damages * * *" (R. 156, 549; 159, 551). No exceptions to these instructions were taken by the plaintiffs (R. 560). In the light of the verdict, it must be presumed that the jury found as a fact that the distribution and exhibition of the motion picture was not "trade" as thus defined.

Only at the conclusion of the case when considering the defendants' counterclaims for declaratory relief, did the trial court hold as a matter of law in paragraph 4 of the declaratory judgment that the distribution and exhibition

of motion picture films did not constitute a use "for advertising purposes or for purposes of trade" within the intent of the statute (R. 180). As with the constitutional issue, if this Court should affirm paragraph 4 of the declaratory judgment, this appeal would be disposed of without the necessity of considering the remaining questions.

POINT III

THE ERRATIC AND DECADENT FORMULA DEVISED BY THE NEW YORK COURTS IS INAPPLICABLE TO THE PRESENT CASE.

Reference has been made to the New York statute, which apparently was the model for the Utah statute. Under the circumstances of the similarity of the laws of the two states, and because the majority opinion of the Tenth Circuit places some reliance upon the New York decisions in construing the Utah statute, a brief discussion of the New York cases may be of some assistance in the present situation.

At the outset, it should be reiterated that the New York statute deals only with living persons and their rights. The New York courts have never had to face the problem of a right of privacy action involving a deceased public figure and the relational rights of his heirs. This distinction must be kept in mind in considering the New York decisions and their application to the case at bar. As heretofore indicated, there are profound reasons based upon cultural necessity for according preferential status to publications concerning the famous dead, as distinguished from

the living. Since the New York decisions deal only with the living, they have little persuasiveness when applied to situations involving the famous dead.

The New York statute had been on the books only a short time before the courts of that state were faced with the necessity of construing it so as not to interfere with time-honored concepts of free speech and press as typified by biographies and newspaper accounts dealing with famous living persons. The New York courts attempted to meet the problem by devising a formula, which, although substantially modified and perhaps destroyed by more recent decisions, nevertheless persists to some extent. The formula is this: In the case of a publication concerning a famous living person, if it is an accurate account of a current news event or is purely biographical or is an absolutely true portrayal or is essentially educational or informative, then it is not a matter of "trade" within the meaning of the New York statute; on the other hand, if the publication is fictionalized or the portrayal is not true or is largely a product of the imagination or is not purely biographical or is not strictly educational or informative, then it is a matter of "trade" proscribed by the statute. As is apparent, the formula was devised not only to take care of the definition of the term "trade" in the statute, but also to meet possible constitutional objections based on free speech and the press. Essentially the same formula was adopted by the majority of the Tenth Circuit in interpreting the Utah statute when the present case was pending before it (194 F. (2d) 6).

One of the first New York cases to apply the above formula was *Binns* v. *Vitagraph,* 210 N. Y. 51, 103 N. E.

1108. In that case a series of motion pictures were produced and exhibited purporting to portray Jack Binns, a wireless operator, and the hero of a ship collision at sea. Binns claimed that the pictures improperly portrayed him and the heroic event of which he was a part, without his consent. He sought relief under the New York statute for an injunction and damages. The New York Court of Appeals, after holding that the "use of the name, portrait, or picture of a living person in truthfully recounting or portraying an actual current event" would not be within the prohibition of the statute, said that in the case before it "the series of pictures were not true pictures of a current event, but mainly a product of the imagination, based, however, largely upon such information relating to an actual occurrence as could readily be obtained." The Court then held that since the motion pictures involved were neither news nor biography, they were within the prohibition of the statute. Substantially, the same formula was repeated and applied with minor variations in *Humiston* v. *Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N. Y. S. 752; *Blumenthal* v. *Picture Classics*, 235 App. Div. 570, 257 N. Y. S. 800; and *Krieger* v. *Popular Publications*, 167 Misc. 5, 3 N. Y. S. (2d) 480.

In recent years, however, the New York courts have stretched and modified their previously announced formula to take from under the ban of the statute, certain publications which otherwise would have been interdicted. For example, in *Koussevitzky* v. *Allen, Towne and Heath, Inc.*, 188 Misc. 479, 68 N. Y. S. (2d) 779, aff. 272 App. Div. 759, 69 N. Y. S. (2d) 432, the New York Supreme Court

held that a book therein involved was a biography of a famous living person and therefore not prohibited by the New York statute, even though the Court recognized that it was in part apocryphal, without factual basis, and in some respects not only untrue but defamatory. In its discussion, the Court said:

> "The book we are considering deals almost entirely with the plaintiff's musical career. Very little is said about his private life. Indeed, the author suggests that Dr. Koussevitzky had room for nothing in his life but music and a devotion to his loyal wife and helpmate. Interspersed with the chronological narration of the facts are stories and comments in connection with the plaintiff's musical career, some avowedly apocryphal, others of doubtful reliability. Curiously enough, although there are many depreciatory statements, they seem to be invariably followed by ameliorative observations of unreserved praise. * * * Most people know that a great conductor's work with his orchestra is not altogether carried on in an atmosphere of sweetness and light. The author evidently knows that too and loses no opportunity to inform his readers about it. In his final chapter, the author gives his personal estimate of the plaintiff's place in musical history and in sentence after sentence we find that depreciation and praise vie with each other for utterance.
>
> "There are statements in the book which the plaintiff might naturally find to be highly objectionable, if he is at all sensitive about those things. He may be able to prove some of them to be untrue and even defamatory. There are however, no so-called revelations of any intimate details which would tend to outrage public tolerance. There is nothing repugnant to one's sense of decency or that takes the book out of the realm of the legitimate

dissemination of information on a subject of general interest."

Still another expression of unhappiness with the Binns' formula is *Malony* v. *Boy Comics Publishers, Inc.*, 277 Div. 166, 98 N. Y. S. (2d) 119. In that case, the plaintiff, a public hero who had assisted in the rescue of injured persons when a bomber plane crashed into the Empire State Building in 1945, brought suit under the New York statute, for publication without his consent of an article together with comic strip cartoons concerning him in a magazine entitled *Boy Comics*. The magazine, published some six months after the actual event had occurred, contained a series of symbolic cartoons dramatically portraying the plaintiff and his rescue of injured persons. There were a number of errors and inaccuracies in the account, also exaggerations and flights of fancy consistent with the character of the publication. The plaintiff placed strong reliance upon the doctrine of *Binns*. The New York Supreme Court held that even though the account and comic strips were sold for profit and were neither educational nor newsworthy, the publication was a matter of legitimate public or general interest concerning a public figure who had been much in the public eye, and that such a publication was not "trade" within the intent of the New York statute. The *Binns* case was disposed of with the comment that "since its decision in 1913, it has been distinguished frequently and confined to its particular facts."

The *Koussevitzky and Malony* cases indicate the crumbling condition of the formula devised by the New

York courts in the application of its statute to publications involving living public figures. A recent case comment in 51 *Michigan L. Rev.* 764, concerning the opinion of the Tenth Circuit in the instant case, sums up the defects of the New York doctrine and its adoption by the majority of the Tenth Circuit, as follows:

> "* * * In determining what matters are permissible because of their informational value, the New York course of decision has indeed been erratic. At times, the courts have resorted to a distinction between a factual treatment of events involving the public figure, which is permissible, and a fictional treatment, which is not, but this distinction has not been the real fulcrum of decision in this area, for it is often ignored and seldom rigidly applied. Behind, and at the source of, the confusion in the New York cases seems to be a shifting of judicial attitude as to the scope of the statute. In what seems to be the better reasoned cases, the courts have proceeded beyond the finding that the defendant-publisher had a commercial motivation to a consideration of the material itself, demonstrating considerable reluctance to apply the statute so long as some informational value could be found; in other cases the courts tend to ignore the possible value of the publication itself and probe the motivation of the publisher in an effort to determine whether the publication is 'for purpose of trade' and thus, ipso facto, prohibited. The majority opinion in the principal case [i. e. the *Donahue* case in the Tenth Circuit] seems to illustrate the defects in this latter approach. The defendant's motives in making the film afford no index to its possible informational value, which would seem to be the real question at issue. Nor can the value of the film be properly assessed by mechanical application of the factual-fictional dis-

tinction, as the New York experience with the distinction well proves. Indeed, the court's use of this distinction, as the dissent in the principal case pointed out, makes it questionable whether historical novels or most historical films may be distributed in Utah without liability under the statute, and demonstrates a marked lack of regard for the freedom of speech and press guaranteed by the United States constitution. It is doubtful that this decision will survive with unimpaired vigor."

As a practical matter, no one has suggested that the ɔrmula of the *Binns* case should be extended to many day ɔ day fictional portrayals in the State of New York of amous living persons. For example, there are being pub- shed daily in the New York newspapers, political and ports cartoons, in which the pictures and names of public igures are used in clearly fictional situations. A few days efore a recent prize fight, a New York newspaper carried cartoon in which Rocky Marciano, the well-known prize ighter, was shown climbing a ladder (symbolic of success) ı an imaginary scene. Another newspaper carried a car- ɔon in which Winston Churchill, portrayed as "Androcles" ; shown removing a thorn from the paw of the British lion. 'hese cartoons represent living people in situations which re "fictional." Yet no one has presumed to suggest that ıe New York statute prohibits such portrayals or that distinction should be made between the factual and the ictional use of a person's name and picture as applied to uch situations. The limitations of the *Binns* formula is ot confined to the field of cartoons. There are produced rom time to time on the New York stage, plays and

sketches in which famous living persons are portrayed in fictional situations. One such example is "As Thousands Cheer" (1933), a famous musical review (music by Irving Berlin, book by Moss Hart) in which a number of then living public figures were impersonated under their own names including Mr. and Mrs. Herbert Hoover, Will H. Hayes, John D. Rockefeller, Sr. and Jr. Another example is the famous play "I'd Rather Be Right" (1938), written by George S. Kaufman and Moss Hart, lyrics by Lorenz Hart, and the music by Richard Rodgers. In this play, the then living actor, George M. Cohan, impersonated the then President of the United States, Franklin Delano Roosevelt, under the President's own name. The cast of characters who were impersonated in the play included members of Roosevelt's cabinet and of his family, and a great many then living famous personalities. The play was satirical and its situations wholly fictional. Still another example, the Viking Press has published in New York, over a period of eleven years, a series of sequelized novels by Upton Sinclair. In these novels the author gives his version of this critical period in world history by creating a fictional character, Lanny Budd, and placing him in imaginary situations carrying on imaginary conversations with many living public figures around whom the actual events of that period revolve. Again, *Collier's* magazine of October 22, 1951, was devoted in its entirety to a wholly imaginary account of the Third World War under the title "Preview of the War We Do Not Want." The account described "Russia's defeat and occupation 1952-1960." In this imaginary account many famous living people were depicted or men-

tioned in fictional situations, including Eisenhower, Tito and Cyrus Sulzberger.

The foregoing illustrations suggest some of the practical limitations to which the decadent formula of *Binns*, as exposed in the New York cases, is necessarily subject. As indicated, the formula is having difficulty surviving even under the present status of the New York authorities. One cannot help but wonder what its fate would be in the face of a challenge based upon the principles enunciated in *Winters* v. *New York*, 333 U. S. 507, 68 S. Ct. 665 and *Burstyn* v. *Wilson*, 343 U. S. 495, 72 S. Ct. 777. In any event, the New York formula applies only to the Living. The case now before this Court deals with the Dead. As heretofore pointed out, both on the basis of constitutional authority and cultural custom, so far as famous deceased public figures are concerned, there is no necessity for attempting to reconcile the dying doctrine of *Binns* with the more recent pronouncements of the New York courts and of the United States Supreme Court.

POINT IV

THE UTAH STATUTE IS A CODIFICATION OF A LIMITED RIGHT OF PRIVACY—PERSONAL IN NATURE.

The plaintiffs make the claim that Sections 103-4-8 and 103-4-9 of the *Utah Code Anno.* (1943) are not merely a codification of the common law right of privacy, but something more which includes a property interest. Therefore, say the plaintiffs, the trial court erred in failing (R.

10) to permit them to further amend their amended complaint by adding allegations pertaining to the value of Jack Donahue's name as a property right in the nature of a monetary asset (R. 67). Similar type "property" allegations were contained in paragraph 9 of the amended complaint, concerning a claim that the exhibition of "Look for the Silver Lining" had prevented Mrs. Donahue from selling a manuscript based upon the career of Jack Donahue. But these allegations were stricken from the complaint by the lower federal court and that action was approved by the Tenth Circuit, on the grounds of irrelevancy and immateriality. Furthermore, this ruling of the federal court was accepted by the plaintiffs by stipulation in the state court (R. 64). In any event, the plaintiffs' attempt to further amend their amended complaint, after the case was at issue and had been pending in the federal and state courts for nearly three years, clearly was a matter for the exercise of the trial court's discretion, and its ruling thereon is not open to review on this appeal.

So far as points I, II, and III of defendants' brief are concerned, it is immaterial whether the Utah statute is deemed to be something more or less than the common law right of privacy. However, since the plaintiffs have raised the question and since the personal nature of the right conferred by the Utah statute is pertinent to the conflict of laws argument hereinafter set forth, the views of the defendants on this aspect of the case are herewith presented.

As previously stated, the Utah statute undoubtedly was derived from the New York statute. No one has ever con-

tended that the New York statute confers or was intended to confer any right except a limited personal right based upon, but narrower than, the common law right of privacy. As stated in *Koussevitzky* v. *Allen, Towne & Heath, Inc.*, 188 Misc. 479, 68 N. Y. S. (2d) 779, 781: The New York statute "sought to protect the sentiments, thoughts and feelings of an individual by embodying 'a legal recognition —limited in scope to be sure, but a clearly expressed recognition nevertheless—of the right of a person to be let alone, a right directed "against the commercial exploitation of one's personality".' " It is significant also that both the majority and minority opinions of the Tenth Circuit treat the Utah statute, like the New York statute, as merely a legislative recognition of the personal right of privacy.

It was not until the publication in 1890 of the article by Warren and Brandeis in 4 *Harvard L. Rev.* 193 that a right of privacy was clearly formulated. The article "enjoys the unique distinction of having initiated and theoretically outlined a new field of jurisprudence" (12 *Columbia L. Rev.* 693). The authors of the article make clear that even though many of the early cases were technically based upon supposed relationships of implied contract or trust, the true "principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense." The article further defines the right of privacy as a distinct and independent right and states that when the right is invaded "a legal remedy for such injury seems to involve the treatment of mere wounded feelings, as a substantive cause of action" (4 *Harvard L. Rev.* 197).

Since the Warren and Brandeis article, all of the better reasoned authorities have recognized the right of privacy as an independent right, personal in nature, and distinct from any principle of property. Recovery for an invasion of the right of privacy is limited to injury to the feelings and sensibilities of the complainant. In the language of Prosser on *Torts,* Section 107, p. 1053: "[T]he right of privacy has been recognized from the beginning as primarily concerned with the protection of a mental interest. It seems obvious that it is only a phase of the larger problem of the protection of plaintiff's peace of mind against unreasonable disturbance." See also *Reed* v. *Real Detective Pub. Co.,* 63 Ariz. 294, 162 P. (2d) 133, 138; *Metter* v. *Los Angeles Examiner,* 35 Cal. App. (2d) 304, 95 P. (2d) 491, 494; *Melvin* v. *Reid,* 112 Cal. App. 285, 297 P. 91; Pound, "Interests of Personality", 28 *Harvard L. Rev.* 343, 363.

Three states, namely, New York, Utah and Virginia, have adopted limited right of privacy statutes. There are no reported decisions construing the Virginia statute. There are a number of decisions interpreting the New York law. The close similarity in wording of the two acts suggests, of course, that the New York statute was used as a model by the Utah legislature. Two New York decisions, *Schuyler* v. *Curtis,* 147 N. Y. 434, 42 N. E. 22 and *Wyatt* v. *Hall's Portrait Studio,* 71 Misc. 199, 128 N. Y. S. 247, the first decided prior to the New York statute and the second after its enactment, both illustrate the view that the right of privacy is purely a personal right for which damages may be recovered only for injury sustained to a person's feel-

ings and sensibilities by reason of the unlawful use of a name, portrait or picture.

The *Schuyler* case was an action brought by a nephew of Mrs. George L. Schuyler, deceased, on behalf of himself and the immediate surviving relatives of the deceased, to enjoin the defendants from exhibiting a statue of Mrs. Schuyler, a noted New York philanthropist and a granddaughter of Alexander Hamilton. The exhibition of the statue was without the consent of the plaintiff or of any of the deceased's surviving relatives. Although the action was brought a couple of years before enactment of the New York privacy statute, the Court of Appeals assumed the existence of such a right for the purposes of the case. The Court after weighing the facts of the case decided that there were no grounds for a claim of mental distress on the part of the plaintiff or of the other relatives of the deceased. In the course of its opinion, the Court discussed at some length the nature of the particular right asserted, holding it to be a purely personal one, which so far as the surviving relatives were concerned, existed only for the protection of their own personal feelings. The Court stated:

> "* * * Whatever the rights of a relative may be they are not, in such case as this, rights which once belonged to the deceased, and which a relative can enforce in her behalf and in a mere representative capacity; as, for instance, an executor or administrator, in regard to the assets of a deceased. It is not a question of what right of privacy Mrs. Schuyler had in her lifetime. The plaintiff does not represent that right. Whatever right of privacy Mrs. Schuyler had died with her. Death deprives us all of rights, in the legal sense of that

> term; and, when Mrs. Schuyler died, her own individual right of privacy, whatever it may have been, expired at the same time. The right which survived (however extensive or limited) was a right pertaining to the living only. It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased. * * *"

Wyatt v. *Hall's Portrait Studio*, supra, arose on a motion for an order to permit the administratrix of the goods, chattels, and credits of Helen Wyatt, deceased, to revive an action which originally had been brought by Helen Wyatt, herself, against the named defendant. The original action had been brought under the New York right of privacy statute, for an injunction and damages for the unauthorized use of Helen Wyatt's name and picture. The question presented was whether the alleged cause of action survived the death of the original plaintiff. The Court (Justice Seabury) said that if the alleged violation of the rights of Helen Wyatt constituted an injury to her person, then the action would abate. But on the other hand, if the alleged violation constituted an injury to some property right, then it would survive her death and the action could be continued in the name of the administratrix. Therefore, said the Court, it was necessary to determine the nature and

character of the "right" referred to by the New York statute. It thereupon held that the right created was in its very nature personal; the injury inflicted by violation of the right did not affect the estate of the person injured, but was strictly an injury to the person of the plaintiff. The Court cited with approval *Schuyler* v. *Curtis*, supra, and concluded that the case before it did not present the question of the independent right of the administratrix to maintain an action based on injury to her feelings resulting from improper interference with the name and memory of the deceased. If such an action could be maintained, the Court said it would necessarily be by virtue of an independent right in the administratrix, and not by virtue of any right derived from the deceased. In the course of its opinion, the Court said:

> "The cause of action arose from the violation of the right of privacy. It was solely the creation of statute, and had no existence independent of the statute (citations). It is evident from the statute that the violation of the right thereby created was intended by the Legislature to be punishable as a crime and actionable as a tort (citation). The right of privacy, or, as it has sometimes been called, the 'right to be let alone,' is in its nature personal. The peculiarly personal character of the cause of action created by the statute, negatives the idea that the Legislature intended that it should be enforceable by the personal representatives of the person in whose favor the cause of action existed. The injury done by the violation of the right does not affect the estate of the person injured, but is strictly an injury to the person of the plaintiff. * * *
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> * * * * *

> "Nor is there room in this case for the contention that the present action should be revived in order to prevent the defendant from improperly interfering with the character or memory of the plaintiff. If such an action could be maintained, it would necessarily be by virtue of an independent right to maintain it, and not by virtue of any right derived from the deceased. The complaint alleges a cause of action in the plaintiff for an injury to her person which did not survive her death, and the motion by her administratrix to revive the action must be denied."

The above cases clearly demonstrate that the New York courts consistently have interpreted the limited statutory right of privacy of that state as exclusive from and unrelated to any principle of property. See Note, 28 *Harvard L. Rev.* 689, 691. So far as the Utah statute is concerned, it is evident that the right conferred likewise is a limited one based upon injury to the feelings of the "heirs" themselves, separate from any right of privacy which the deceased relative, himself, might have had during his own lifetime. The "heirs' " cause of action for an alleged violation of their right of privacy in the name of their deceased relative is a purely personal right, not a property right. Their damage, if any, would consist of "injuries sustained" to *their* feelings by reason of the alleged unlawful use of their relative's name in Utah. The plaintiffs in the present case obviously adopted this view of the Utah statute at the time of drafting both their original and their amended complaint, since they alleged a cause of action based only upon "injuries sustained" to their feelings by reason of the portrayal of the deceased Jack Donahue without their consent. No

damage of any kind was requested by reason of any invasion of a property interest. The amended complaint speaks only of the "vexed and annoyed and humiliated" sensibilities of the plaintiffs.

There is nothing in any of the several cases cited by the plaintiffs which in any way reflects upon the expressed view as to the personal nature of the right of privacy. *Hinish* v. *Meier & Frank Company, Inc.*, 166 Or. 482, 113 P. (2d) 438; *Pavesich* v. *New England Mutual Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, and *Cason* v. *Baskin*, 155 Fla. 198, 20 So. (2d) 243, all are cases which recognize the right of privacy as a new and independent right and historically trace the development of the privacy concept from the early cases involving property and contract rights. *Edison* v. *Edison Polyform Mfg. Co.*, 73 N. J. Eq. 136, 67 A. 392, *Flake* v. *Greensboro News Co.*, 212 N. C. 780, 195 S. E. 55, and *Munden* v. *Harris*, 153 Mo. App. 652, 134 S. W. 1076 are examples of the reasoning of some of the earlier cases in which the courts persist in considering the problem as pegged to an extent at least on property and contract rights, and indicate a reluctance to recognize that in reality a new interest of personality is involved. The reasoning found in cases of this type is not in accord with what is now clearly the majority view, and overlooks entirely the profound consideration given the personal nature of the right by such outstanding authorities as Warren, Brandeis and Pound.

POINT V

THE UTAH CONFLICT OF LAWS RULE REQUIRES PLAINTIFFS' SUBSTANTIVE

RIGHTS TO BE DETERMINED BY THE LAW OF CALIFORNIA.

The plaintiffs' amended complaint alleged a single tort for injury resulting from the allegedly unlawful use of the name of Jack Donahue by exhibition of "Look for the Silver Lining" in various "theatres and on numerous occasions throughout the State of Utah and throughout the United States" (R. 50). The amended complaint did not seek damages for each separate exhibition of the motion picture or for exhibitions that occurred in each separate state. By the terms of their pleading, the plaintiffs sought recovery in a single cause of action for all damages caused by all exhibitions in all theatres where the motion picture had been shown "throughout the United States." The tort alleged was a multi-state one, with incidents in different states wherever "Look for the Silver Lining" had been exhibited and wherever the plaintiffs had sustained injury to their feelings as a result thereof. These allegations were supported by the plaintiffs' testimony at the trial. Mrs. Donahue and her daughters testified that they were residents of Los Angeles, California, and had lived there since 1936. Until the time of trial, they had never been in Utah except to stay over-night enroute to their summer home in Cape Cod (R. 214; 253-254). Plaintiffs saw the motion picture at a preview in Beverly Hills on March 15, 1949 (R. 244; 251). They saw the picture only on that one occasion (R. 255) and at the suggestion of one of their attorneys (R. 252). They were upset, humiliated and distressed by the picture (R. 235; 255). So far as the hurt to their feelings was concerned, they had never picked out

any particular state in which to measure their hurt (R. 250). They didn't think they could limit their hurt to the boundaries of any particular state (R. 262). The full amount of damages prayed for in the amended complaint was based upon the hurt they felt as a result of the exhibition of the motion picture throughout the United States and the world (R. 262; 265-266). The prayer for damages referred to all exhibitions including the exhibition at the Beverly Hills Theatre which plaintiffs witnessed. It was upon seeing the motion picture in California that the plaintiffs felt the most acute shock to their feelings (R. 26-65).

The first question which a court is required to consider, when confronted with a case sounding in tort such as the present one, is: What law should govern the substantive rights of the parties? In the case of a multi-state tort such as the one at bar, a choice of applicable law must be made.

What then is the Utah conflict of laws rule under these circumstances? *Sartin* v. *Oregon Short Line R. Co.*, 27 Utah 447, 76 P. 219, *Johnson* v. *Union Pacific Coal Co.*, 28 Utah 46, 76 P. 1089, and *Buhler* v. *Maddison,* 109 Utah 267, 176 P. (2d) 118, 168 A. L. R. 177, make crystal clear that the Utah conflict of laws rule is that the law of the place of wrong governs the right of recovery for injuries to the person. In fact, *Buhler* v. *Maddison,* supra, goes so far as to say that procedural matters intimately connected with the substantive right of action likewise must be governed by the law of the place of wrong. The cited Utah cases, as well as general tort law, hold that the place of wrong is the place where the injury takes effect upon the

person. *Restatement, Conflict of Laws,* Section 377; *State* v. *Devot,* 66 Utah 319, 242 P. 395; see also *Stoltz* v. *Burlington Transportation Co.,* (C. C. A. 10), 178 F. (2d) 514, 15 A. L. R. (2d) 759. In the *Devot* case, this Court stated that if a person in Utah fraudulently should obtain money from a person in California, the case should be determined in California "where the injury was done and the consequences of the wrong inflicted."

Under the compulsion of the Utah conflict of laws rule, the next query is where did the impact of injury take place with respect to the damages alleged by the plaintiffs in the present case? Obviously, any "mental and physical suffering" sustained by the plaintiffs took effect in the state in which the plaintiffs were physically located at the time of the alleged unlawful exhibitions of the motion picture. If the plaintiffs were physically present in California at all times during which the exhibitions occurred in Colorado or Utah or Delaware or New York, the impact of injury on their feelings and sensibilities took place in California rather than in the respective states where the exhibitions took place. It is undisputed that the plaintiffs at all times alleged and referred to in their amended complaint were citizens and residents of California. Necessarily their mental and physical suffering, if any, resulting from the acts complained of, took effect and made impact upon the bodies and minds of the plaintiffs in California. It must follow, therefore, that California law governs the plaintiffs' right to recover for the tort here alleged. Under the substantive law of California even the plaintiffs agree that they cannot maintain an action of the kind here al-

leged. *Metter* v. *Los Angeles Examiner*, 35 Cal. App. (2d) 304, 95 P. (2d) 491.

The majority opinion of the Tenth Circuit on this phase of the case states that "the initial sneak preview of the picture in California and the appellants seeing it there did not as a matter of law bar recovery under the statute of Utah. * * *" It is true that a lower federal court in *Banks* v. *King Features Syndicate*, (D. C., S. D., N. Y.), 30 F. Supp. 352 has held that the law of the state where the seal of privacy was first broken constitutes the controlling law. This is one of several possible conflict of laws rules suggested by an article in 60 *Harvard Law Rev.* 941. But each state is free to adopt such rules of conflict of laws as it may choose. *Wells* v. *Simonds Abrasive Co.*, 344 U. S. 815, 73 S. Ct. 856. And the defendants' contention throughout this case has been that the orthodox conflict of laws rule of Utah should be applied, that is, that the cause of action should be governed by the law of the state where the injury occurred. This is the conventional conflict of laws rule which has been established in this state. Under the Utah rule that the *lex loci delicti* governs, it is immaterial where the seal of privacy was first broken or where or when the various exhibitions of the motion picture took place. In either instance, the complainants' right of action would be governed by the law of the state where they sustained injury to their feelings and sensibilities, that is, the state where they were physically located. Since the only damage that is or can be claimed by the plaintiffs in this case is for injury to their feelings and sensibilities, it is a self-demonstrating proposition their injury, if any,

necessarily occurred at the place where they were physically resident. Any impact of harm, whether physical or mental, must take effect upon a person at the place where the person is located.

As indicated in the comment to Section 377 of the *Restatement, Conflict of Laws,* "each state has legislative jurisdiction to determine the legal effect of acts done or events caused within its territory. If the consequences of an act done in one state occur in another state, each state in which any event in the series of acts and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof." Thus, in a privacy action, both the state in which the exhibitions take place and the state in which the injuries or legal consequences of the exhibitions take place may have legislative jurisdiction to impose an obligation to pay for harm caused thereby. But legislative jurisdiction to create an obligation is one thing; the problem of making a choice of law between several states each of which has exercised its proper legislative jurisdiction to create a liability is still another. As stated in the *Restatement, Conflict of Laws,* Section 65, Comment b.:

> "Under the rule stated * * * [and set forth above], it may and frequently does happen that more than one state has legislative jurisdiction to attach rights or other interests to a series of events started by a person's act. In an action brought to enforce an obligation imposed by reason of such series of events or in an action brought to punish the actor, the court at the forum must select the law of one of the several states thus having

> legislative jurisdiction, to govern the case * * *. The rules governing such choice are stated in Chapter 9."

Chapter 9 of the *Restatement* above referred to, begins with Section 377 which defines the place of wrong as the state where the injury takes place, and continues in Section 378 with the statement that the law of the place of wrong determines whether a person has sustained a legal injury.

With respect to a multi-state tort with incidents in several states such as alleged and proved in this case, each state in which any one of these incidents occurs has legislative jurisdiction to create rights and liabilities with respect to these acts and the consequences thereof. Furthermore, each state is competent to enact such legislation without regard to the incidents of the tort which occur in the other states involved. This does not mean, however, that each state should apply the substantive law of the forum without regard to the rules of conflict of laws. When an action which cuts across state lines is filed in one of these states, a court sitting in that state must make a choice of applicable law in accordance with the established conflict of laws rule of the forum.

It is true that the plaintiffs contend that their cause of action in this case is a statutory one, with its source and genesis in Section 103-4-9 of the *Utah Code Anno.* (1943) and that it is not based upon general law. However, the question whether the plaintiffs' action is based upon a statute or upon general law is immaterial to the conflict of laws issue. As evidenced by the numerous authorities cited

in the dissenting opinion of Chief Judge Phillips of the Tenth Circuit, in considering the conflict of laws problem it makes no difference whether the respective rights are created by the common law or by statute. If no cause of action is created at the place of injury, no recovery can be had in any other state. This is so even in a situation where the cause of action is conferred by statute in the place where the action is brought, but is denied by the common law of the state where the injury takes place. *Restatement, Conflict of Laws,* Section 384. Illustrative of this is the case of *LeForest* v. *Tolman,* 117 Mass. 109, 19 Am. Rep. 400, in which the plaintiff was bitten by a dog which had strayed into the State of New Hampshire. The dog was owned by the defendant, a resident of Massachusetts. Under the common law of New Hampshire, plaintiff would not be entitled to recover; under a Massachusetts statute recovery would be permitted. The plaintiff brought an action in Massachusetts seeking recovery under the provisions of the Massachusetts law. It was *held* that since the injury occurred in New Hampshire, the law of that state governed and accordingly the action could not be maintained. See also *Hunter* v. *Derby Foods, Inc.,* 2 Cir., 110 F. (2d) 970.

The brief of the plaintiffs on this point concedes that the Utah conflict of laws rule, as well as other authorities on the subject, provides that in a tort case the choice of law is determined by the "place of wrong." Section 377 of the *Restatement, Conflict of Laws,* defines the "place of wrong" as the state where the last event necessary to make an actor liable for an alleged tort takes place. In the usual

situation, therefore, the last event necessary to make a tort complete is the fact of injury to body or mind. Such is the situation in the present case, where the plaintiffs' cause of action is based upon an injury to their feelings and sensibilities. The amended complaint states that by reason of the violation of plaintiffs' alleged rights they have been "greatly vexed and annoyed and humiliated, and caused great mental and physical suffering to their injury and damage" (R. 51). No other type of damage is requested or mentioned. Under the provisions of the Utah privacy statute nothing else could be requested or mentioned, since the statute specifically conditions the right of recovery to "any injuries sustained by reason of" the alleged violation.

Because of the fact that the amended complaint as well as the language of the Utah statute specifically makes injury to feelings the last event necessary to complete the alleged tort, there is no merit to the argument on page 98 of plaintiffs' brief concerning the conflict of laws rule in defamation cases and its possible application to right of privacy actions. In defamation cases, the gravaman of the tort is not injury to the feelings of the person defamed, but rather injury to that person's reputation so far as third persons are concerned. In defamation cases, the last event necessary to complete the tort takes place where the libel or slander is heard by third persons conversant with the reputation of the person defamed. Ordinarily, this would mean that the place of wrong in a defamation case is where the statement was published or broadcast. But it is obvious that an entirely different concept would be applicable to a privacy case, where, as under the Utah statute, injury

to the person's feelings is an essential condition of the right of recovery.

There is good reason and a wise policy for application of the conventional Utah conflict of laws rule to the type of factual situation set forth in the plaintiffs' amended complaint. The rule supplies the virtues of simplicity and uniformity to the solution of an otherwise complex problem. It avoids the necessity in a multi-state tort case of an examination and application of the law of the many different states where the alleged unlawful acts complained of took place. In most instances, the rule that the law of the place of injury governs, results in the application of the law of the state where a plaintiff has physical status (usually his place of residence) and therefore confers rights in accordance with the policy and law of the community most intimately connected with a plaintiff. Of the several conflict of law rules suggested by the authorities, it is the most in accord with common sense as well as legal precedent.

The problem raised here is not—as plaintiffs would like to pose it—whether a nonresident of Utah, who suffered injury to his feelings within Utah from an invasion of his right of privacy in the name of his deceased ancestor occurring within or without Utah, can invoke the Utah statute. The problem is whether the State of Utah can by statute create a right of action for injuries suffered by a person in another state, on account of a wrongful act occurring in the State of Utah, the force of which reaches beyond the territorial limits of Utah and into another state.

And further, if Utah can create such an extra-territorial right, not recognized at common law, whether the legislature intended to do so in enacting Sections 103-4-9 of the *Utah Code Anno.* (1943). In answer, it is submitted that if the Legislature had intended to give extra-territorial effect to the Utah statute, it would have so stated by clear and unambiguous language. It is an established principle of long standing that no law has any effect of its own force beyond the territorial limits of the sovereignty from which its authority is derived. *Hilton* v. *Guyot,* 159 U. S. 113, 163, 16 S. Ct. 139; *Cooley's Constitutional Limitations,* 8th Ed. Vol. 1, pp. 154, 248. Hence, the presumption is that a statute is intended to be confined in its operation and effect to the territorial limits over which the lawmakers have general and legitimate power. In *Sandberg* v. *McDonald,* 248 U. S. 185, 195, 39 S. Ct. 84, 86, the Supreme Court said: "Legislation is presumptively territorial and confined to limits over which the lawmaking power has jurisdiction."

As herein demonstrated, under the common law conflict of laws rule of Utah, the injury to plaintiffs' feelings, if any, occurred in California and California was the place of wrong and the rights of the plaintiff should be determined by the law of that state. Since this is the applicable common law conflict of laws rule of Utah, it should not be presumed that the legislature intended to overturn or abrogate it by Section 103-4-9, *Utah Code Anno* (1943), unless such intent clearly appears, either by express declaration or by necessary implication. There is no legislative history of any such intent and certainly no such intent is

manifest from the language of the statute itself. In *Niblock* v. *Salt Lake City*, 100 Utah 573, 582, 111 P. (2d) 800, 804, this Court said that where a statute imposes a liability not recognized at common law, it will not be extended "further than the clear intendment of the statute." And *Carlo* v. *Okonite-Callender Cable Co.*, 3 N. J. 253, 69A (2d) 734, 740, makes clear that "to affectuate any change in the common law, the legislative intent to do so must be clearly and plainly expressed."

CONCLUSION

For the reasons herein set forth, the Utah right of privacy statute should be construed as inapplicable to motion pictures or other publications protected by the constitutional guarantees of free speech and the press; also such expressions of free speech and the press should be held not "trade" within the meaning or intent of the Utah statute; furthermore, the conflict of laws rule of Utah makes the law of California determinative of the rights of the plaintiffs. Therefore, the judgment entered on the jury verdict of "no cause of action" should be affirmed, also

the declaratory judgment entered at the conclusion of the trial should be affirmed.

Respectfully submitted,

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APPENDIX A

Some of the Motion Pictures in Which Famous Dead People Have Been Portrayed Fictionally.

Hans Christian Anderson in Hans Christian Anderson, Goldwyn—RKO (1952).

Enrico Caruso in The Great Caruso, MGM (1951).

Toulouse Lautrec (Famous Artist) in Moulin Rouge, United Artists (1952).

John Alden in Plymouth Adventure, MGM (1952).

Richard the Lion Hearted in Ivanhoe, MGM (1952).

Zapata (Mexican Revolutionist) in Viva Zapata, 20th Century (1952).

Gen. Rommel in Desert Fox, 20th Century Fox (1952).

John Phillip Sousa in Stars and Stripes Forever, 20th Century (1952).

Grace Moore (Famous Opera Singer) in So This is Love, Warner Bros. (1953).

Colonel James Bowie (Inventor of the bowie knife) in the Iron Mistress, Warner Bros. (1952).

Oliver Wendell Holmes and Louis D. Brandeis in The Magnificent Yankee, MGM (1950).

Abraham Lincoln and Ann Rutledge in Young Mr. Lincoln, 20th-Fox (1939); and Abe Lincoln in Illinois, RKO (1938).

Knute Rockne in Knute Rockne—All American, Warner (1940).

Paul Dreiser (Author of "On the Banks of the Wabash") in My Gal Sal, 20th-Fox (1942).

Enrico Caruso in The Great Caruso, MGM (1951).

Queen Victoria, Benjamin Disraeli in The Mudlark, 20th-Fox (1950).

Rudolph Valentino in The Life of Rudolph Valentino, Columbia (1951).

Bill Cody ("Buffalo Bill") in Buffalo Bill, 20th-Fox (1944).

Edith Cavell in Nurse Edith Cavell, RKO (1939).

Texas Guinan in Incendiary Blonde, Paramount (1945).

William Morton (Boston dentist who introduced the use of anesthesia in 1836) in The Great Moment, Paramount (1944).

Hiram Maxim (Inventor) in So Goes My Love, Universal (1946).

Lillian Russell in Lillian Russell, 20th-Fox (1940).

Daniel Decatur Emmett (Famed minstrel man and author of Dixie) in Dixie, Paramount (1942).

Louis Pasteur in The Story of Louis Pasteur, Warner (1935).

Emile Zola in The Life of Emile Zola, Warner (1940).

Woodrow Wilson in Wilson, 20th-Fox (1944).

Thomas Edison in Edison the Man, MGM (1940); and Young Tom Edison, MGM (1940).

Theodore Roosevelt in The Rough Riders, Paramount (1927).

General Custer in They Died With Their Boots On, Warner (1941).

Andrew Jackson in The Gorgeous Hussy, MGM (1936).

Pearl White, Perils of Pauline, Paramount (1947).

Victor Herbert in The Great Victor Herbert, Paramount (1939).

Florence Nightingale in Lady With the Lamp, British (1951).

General Rommel in The Desert Fox, 20th-Fox (1951).

Major Frank Cavanaugh in The Iron Major, RKO (1943).

Charles Parnell in Parnell, MGM (1937).

The Rothschilds in The House of Rothschild, United Artists (1934).

Benjamin Disraeli in Disraeli, Warner (1929); and Disraeli, United Artists (1921).

Alexander Hamilton in Alexander Hamilton, Warner (1931).

Madame Curie in Madame Curie, MGM (1943).

Jim Brady in Diamond Jim, Universal (1935).

Walter Reed in Yellow Jack, MGM (1938).

Crown Prince Rudolph and Baroness Mary Vetsera in Mayerling, French (1937).

Jim Corbett in Gentleman Jim, Warner (1942).

Chauncey Olcott, Lillian Russell in My Wild Irish Rose, Warner (1947).

Johann Strauss, Jr., in The Great Waltz, MGM (1938).

Julius Reuters in Dispatch from Reuters, Warner (1940).

Annie Oakley, Buffalo Bill in Annie Get Your Gun, MGM (1950).

Jack London in Jack London, United Artists (1943).

Robert and Clara Schuman in Song of Love, MGM (1947).

Dempster MacMurphy (Chicago newspaper and utilities executive who engaged in philanthropic work under the name of St. Dismas) in The Hoodlum Saint, MGM (1945).

Amelia Earhart in Flight for Freedom, RKO (1943).

Mark Twain in Adventures of Mark Twain, Warner (1944).

Nora Bayes in Shine On Harvest Moon, Warner (1944).

George Gershwin in Rhapsody in Blue, Warner (1945).

Henry Dunant (Founder of the International Red Cross) in Man to Men, French (1949).

Tony Pastor in Daughter of Rosie O'Grady, Warner (1950).

The Barretts and Browning in The Barretts of Wimpole Street, MGM (1934).

The Daltons in The Daltons Ride Again, Universal (1945); and When the Daltons Rode, Universal (1940).

Rasputin in Rasputin and the Empress, MGM (1932); Rasputin, Universal (1930); Rasputin, German (1929); and Rasputin, the Black Monk, Foreign (1917).

Sutter in Sutter's Gold, Universal (1936).

Napoleon and Marie Walewska in Conquest, MGM (1937); Napoleon, MGM (1929); and Napoleon and Josephine, American (1924).

Jesse James, Frank James in Jesse James, 20th-Fox (1939); Jesse James, Frank James in Jesse James, Paramount (1927).

Dr. Ehrlich in Dr. Ehrlich's Magic Bullet, Paramount (1940).

Alexander Hamilton in Alexander Hamilton, Warner (1931).

Dr. Samuel Alexander Mudd (He aided John Wilkes Booth) in The Prisoner of Shark Island, 20th-Fox (1936).

Bernadette in The Song of Bernadette, 20th-Fox (1933).

Frederick Chopin in A Song to Remember, Columbia (1945).

Calamity Jane in Texan Meets Calamity Jane, Columbia (1950).

Cyrano de Bergerac in Cyrano de Bergerac, United Artists (1950).

Joan of Arc in Joan of Arc, RKO (1948).

Mother Cabrini in The Life and Miracles of Blessed Mother Cabrini, American (1946).

Elizabeth and Essex in Private Lives of Elizabeth and Essex, Warner (1939).

Charlotte and Emily Bronte in Devotion, Warner (1946).

Alexander Graham Bell in The Story of Alexander Graham Bell, 20th-Fox (1939).

Boss Tweed in Up in Central Park, Universal (1948).

Dolly Madison in The Magnificent Doll, Universal (1946).

Columbus in Christopher Columbus, Universal (1949).

Andrew Johnson in Tennessee Johnson, MGM (1942).

Billy the Kid in The Kid From Texas, Universal (1950); I Shot Billy the Kid, Lippert (1951); The Outlaw, RKO (1947); and Billy the Kid, MGM (1941).

John Montgomery (Aviation Pioneer) in Gallant Journey, Columbia (1946).

Lou Gehrig in Pride of the Yankees, RKO (1942).

Peter Stuyvesant, Washington Irving in Knickerbocker Holiday, United Artists (1944).

Father Duffy in The Fighting 69th, Warner (1940).

Stephen Foster in Swanee River, 20th-Fox (1939).

Jacques Offenbach (Composer) in The Paris Waltz, French, (1950).

Marie Antoinette in Marie Antoinette, MGM (1938).

In recent years Warner Bros. Pictures, Inc., have produced the following series of short motion pictures, in which deceased public figures were portrayed fictionally under their own names:

Theodore Roosevelt in Teddy, the Rough Rider (1940).

James Monroe, President Grover Cleveland, John Quincy Adams, John C. Calhoun, Henry Clay and Theodore Roosevelt in The Monroe Doctrine (1939).

Abraham Lincoln in Lincoln in the White House (1939).

General "Stonewall" Jackson, Robert E. Lee in Under Southern Stars (1937).

Andrew Jackson, Mrs. Jackson, Abraham Lincoln in Old Hickory (1939).

Thomas Jefferson, James Monroe, Napoleon in The Romance of Louisiana (1938).

Thomas Jefferson, Benjamin Franklin, John Adams, John Hancock in Declaration of Independence (1938).

Thomas Jefferson in Bill of Rights (1939).

Francis Scott Key, Mary Key in The Song of a Nation (1936).

Patrick Henry in Give Me Liberty (1936).

George Washington, Haym Salomon, Nathan Hale in Sons of Liberty (1939).

Some of the Plays in Which Famous Dead People Have Been Portrayed Fictionally.

Oliver Wendell Holmes and Louis Brandeis in The Magnificent Yankee, by Emmet Lavery (1946).

Anna Held, Lillian Russell (actresses); Diamond Jim Brady (famous night-life figure of the Gay Nineties); John L. Sullivan (prizefighter), and Steve Brody (the man who jumped off Brooklyn Bridge) in Hold Your Horses, by Russel Crouse and Corey Ford (1933).

Boss Tweed and Thomas Nast in Up In Central Park, by Herbert and Dorothy Fields. Music by Sigmund Romberg (1945).

Nellie Bly (Reporter) in Nellie Bly, by Jack Emmanuel. Music by Johnny Burke and James Van Heusen (1946).

Abraham Lincoln and Ann Rutledge in Spirit of Ann Rutledge, by H. W. Gammans and Abe Lincoln in Illinois, by Robert E. Sherwood (1938); and in Prologue to Glory, by E. P. Conkle (1938).

Abraham Lincoln in Abraham Lincoln, by John Drinkwater (1919); and in If Booth Had Missed, by Arthur Goodman (1932); and in Yours, A. Lincoln, by Paul Horgan (1942); and in War President, by Nat Sherman (1944); and in A Man of the People, by Thomas Dixon (1920); and in The Mantle of Lincoln, by Test Dalton (1926).

John Wilkes Booth in The Man Who Killed Lincoln, by Elmer Harris (1940).

Annie Oakley (famous markswoman and circus performer) in Annie Get Your Gun, by Herbert and Dorothy Fields. Music by Irving Berlin (1946).

Oscar Wilde, Frank Harris in Oscar Wilde, by Leslie and Sewell Stokes (1938).

Walter Reed in Yellow Jack, by Sidney Howard in collaboration with Paul de Kruif (1934).

Emily Dickinson in Eastward in Eden, by Dorothy Gardner (1947).

Mary Surratt (She was innocently convicted for conspiring in the murder of Abraham Lincoln) in The Story of Mary Surratt, by Russell Lewis and Howard Young (1947).

Woodrow Wilson in In Time to Come, by Howard Koch and John Huston (1941).

Benjamin Disraeli in Disraeli, by Louis N. Parker (1917).

Benjamin Disraeli in Young Mr. Disraeli, by Elswyth Thane (1937).

Charles Dickens in The Ivy Green, by Mervyn Nelson (1949).

Charles Dickens in Romantic Mr. Dickens, by H. H. and Marguerite Harper (1940).

P. T. Barnum, Capt. Kidd, Henry VIII, Cleopatra, Salome in Houseboat on the Styx, by Kenneth Webb and John E. Hazzard (1928), (From the novel by Jerome K. Jerome).

Crown Prince Rudolph and Marie Vetsera in Marinka, by George Marion, Jr. and Karl Farkas. Music by Emmerick Kalman (1945).

Emperor Franz Joseph of Austria-Hungary and Empress Elizabeth, Crown Prince Rudolph, Baroness Mary Vetsera in The Masque of Kings, by Maxwell Anderson (1937).

Parnell, Gladstone, Capt. William O'Shea, Katharine O'Shea in Parnell, by Elsie Schauffler (1935).

Edvard Grieg in Song of Norway; operetta by Milton Lazarus, from a Play by Homer Curran (1944).

Johann Strauss, Jr. in Mr. Strauss Goes to Boston, by Leonard L. Levenson. Music by Robert Stolz and Robert Sour (1945).

Johann Strauss, Sr. and Johann Strauss, Jr. in The Great Waltz, by Moss Hart (1934).

Queen Victoria, Benjamin Disraeli in Victoria Regina, by Laurence Housman (1938).

Gilbert and Sullivan, Queen Victoria, Oscar Wilde, Crown Prince Wilhelm, Whistler in Knights of Song, by Glendon Allvine (1938).

Florence Nightingale in The Lady With the Lamp, by Reginald Berkeley (1931).

Edgar Allan Poe in Plumes in the Dust, by Sophie Treadwell (1936).

Franz Schubert in Blossom Time, adapted by Dorothy Donnelly from the original of Willner and Reichert. Music adapted by Sigmund Romberg from the melodies of Franz Schubert and H. Berte (1921).

John Brown in Battle Hymn, by M. Blankfort and M. Gold (1936).

John Brown in John Brown, by Ronald Gow (1934).

Jefferson Davis in Jefferson Davis, by John McGee (1936).

Harriet Beecher Stowe in American Landscape, by Elmer Rice (1938).

Daniel Webster in The Devil and Daniel Webster, by Stephen Vincent Benet and Douglas Moore (1939).

Lord Byron in Bright Rebel, by Stanley Young (1938).

The Barretts and Robert Browning in The Barretts of Wimpole Street, by Rudolf Besier (1931).

Charlotte and Emily Bronte in Moor Born, by Dan Totheroh (1934).

Harriet Beecher Stowe (and several members of the Stowe and Beecher families) in Harriet, by Florence Ryerson (1943).

Aaron Burr in Colonel Satan, by Booth Tarkington (1931).

Elisa Bowen ("Mme. Jumel"), Stephen Jumel, Aaron Burr in Great Lady, by Earle Crooker and Lowell Brentano (1938).

George Washington, Lafayette, Major Andre, Sir William Howe in Valley Forge, by Maxwell Anderson (1934).

Nathan Hale in Death of Capt. Nathan Hale, by D. Trumbull.

George Washington in George Washington, by Percy Mackaye (1920).

Thomas Jefferson, George Washington, James Madison, Alexander Hamilton, James Monroe in The Patriots, by Sidney Kingsley (1943).

Franz, Duke of Reichstadt in L'Aiglon, by Edmond Rostand (1934).

Napoleon Bonaparte in St. Helena, by R. C. Sherriff and Jeanne de Casalis (1936).

Napoleon Bonaparte in Dynasts, by Thomas Hardy.
Empress Josephine, in Napi, by Brian Marlow (1931).

Napoleon and Josephine in Her Man of Wax, by Julian Thompson (1933).

Marie Antoinette in Marie Antoinette, by Upton Sinclair (1939).

Marie Antoinette, Joseph II, Emperor of Austria in Madame Capet, by George Middleton (1938).

Georges Jacques Danton, Robespierre in Danton's Death, translated by G. Dunlop, from the German of George Buchner (1938).

Catherine the Great in Catherine Was Great, by Mae West (1944).

Peter Stuyvesant, Washington Irving in Knickerbocker Holiday, by Maxwell Anderson (1938).

Du Barry and Louis XIV in Du Barry Was a Lady (1939).

Johann Goethe in Frederika, by Franz Lehar (1937).

Keats, Shelley, Byron and Fanny Brawne in Aged 26, by Anne Crawford Flexner (1936).

Anne, Queen of England ("Mrs. Morley"), John Churchill, 1st Duke of Marlborough, Sarah, Duchess of Marlborough in Anne of England, by Mary Cass Canfield and Ethel Borden (1941).

King James II in The O'Flynn, by Brian Hooker and Russell Janney, from Justin H. McCarthy's Novel and Play (1934).

George Sand, Chopin, Liszt, Heine in White Lilacs, by Sigurd Johannsen (1928).

Queen Elizabeth and Essex in Gloriana, by Ferdinand Bruckner (1938).

Henry VIII and Anne Boleyn in Anne of the Thousand Days, by Maxwell Anderson (1948).

William Shakespeare in Second Best Bed, by N. Richard Nash (1946).

Benvenuto Cellini in The Firebrand of Florence, by Edwin Justin Mayer and Ira Gershwin. Music by Kurt Weil (1945).

Benvenuto Cellini in The Firebrand, by Edwin Justin Mayer (1924).

Queen Elizabeth, Essex, Bacon, Raleigh in Elizabeth the Queen, by Maxwell Anderson (1930).

Mary, Queen of Scots in Mary of Scotland, by Maxwell Anderson (1933).

Joan of Arc in Joan of Lorraine, by Maxwell Anderson (1946).

Cyrano de Bergerac in Cyrano de Bergerac, by Edmond Rostand (1898, 1st production in U. S. A.)

Francois Villon in The Vagabond King (1925).

Christopher Columbus, Queen Isabella of Spain, King Ferdinand in Christopher Comes Across, by Hawthorne Hurst (1932).

Richard II, Duke of Gloucester in Richard of Bordeaux, by Gordon Daviot (1934).

Cesare Borgia, Macchiavelli in The Tyrant, by Rafael Sabatini (1930).

King Arthur in A Connecticut Yankee. A musical adaptation of Mark Twain's novel. Music by Rodgers and Hart (1927).

Thomas A. Becket (Archbishop of Canterbury) in Murder in the Cathedral, by T. S. Eliot (1936).

Cardinal Richelieu, Louis XIII in The Red Robe. From the novel by Stanley Weyman (1928).

Some of the Novels in Which Famous Dead People Have Been Portrayed Fictionally.

Franklin D. Roosevelt in O Shepherd Speak!, by Upton Sinclair (1949).

Napoleon in War and Peace, by Leo Tolstoy (1869).

Vincent Van Gogh in Lust for Life, by I. Stone (1934).

Mrs. Jack Gardner and John Singer Sargent in The Lady and the Painter, by Countess Eleanor Palffy (1951).

Emily Dickinson in Come Slowly, Eden, by L. Benet (1942).

Abraham Lincoln in The Soul of Ann Rutledge, by Bernie Babcock (1919).

Theodore Roosevelt in Rich Man, Poor Man, by Mrs. J. A. Fairbank (1936).

Andrew Jackson and his Rachel in The President's Lady, by Irving Stone (1951).

William Jennings Bryan in 42nd Parallel, by John R. Dos Passos.

Anna Ella Carroll (A lawyer and the brainy woman behind Lincoln) in Woman With a Sword, by H. Noble (1948).

Queen Victoria in The Mudlark, by T. Bonnet (1949).

Ulysses S. Grant in The Crisis, by Winston Churchill (1901).

Goethe and his Lotte of Weimar in The Beloved Returns, by Thomas Mann.

Robert Browning and Elizabeth Barrett in Miss Barrett's Elopement, by Mrs. C. M. A. O. Lenanton (1930).

Washington in The Virginians, by W. M. Thackeray.

Thomas Carlyle in Speaking Dust, by Mrs. E. P. Thorton-Cook (1938).

Shelley in Orphan Angel, by Mrs. E. H. Wylie (1926).

Charlotte and Emily Bronte in These Were the Brontes, by D. H. Cornish (1940).

Louisa May Alcott in O Genteel Lady!, by E. Forbes (1926).

Samuel Johnson in Dr. Sam: Johnson, Detector, by L. De La Torre-Bueno (1946).

Jonathan Swift in Violent Friends, by W. Clewes (1945).

Robert Burns in Immortal Lover, by J. A. Steuart (1929).

Shakespeare in Master Skylark, by J. Bennett.

Alexander Hamilton, Washington, Madison, Adams in The Conqueror, by Gertrude Atherton.

Byron in Glorious Apollo, by Mrs. L. M. A. Beck (1925).

Lord Nelson and Lady Hamilton in Divine Lady, by Mrs. L. M. A. Beck (1936).

Keats in Special Hunger, by G. O'Neil (1931).

Charles Lamb, Mary Lamb in So Perish the Roses, by S. Southwold (1940).

Numerous novels have been written concerning most of the above named deceased public figures. The novels listed above are merely instances. Needless to say, thousands of similar novels have been written concerning numberless other deceased public figures.

..."

APPENDIX B

The following extracts are from the book *A Guide to the Best Historical Novels and Tales* by Jonathan Nield (published by Elkin Mathews & Marrot, London, 1929).

> "These Historical Novels have taught all men this truth, which looks like a truism, and yet was as good as unknown to writers of history and others, till so taught: that the bygone ages of the world were actualy filled by living men, not by protocols,

state-papers, controversies, and abstractions of men."

Carlyle on the Waverley Novels.

"Those who know very little of the past and care very little for the future, will make but a sorry business of the present. * * * The great Duke of Marlborough said that he had learnt all the history he ever knew out of Shakespeare's historical plays. I have long thought that if we persuaded those classes who have to fight their own little battles of Blenheim for bread every day, to make such a beginning of history as is furnished by Shakespear's plays and Scott's novels, we should have done more to imbue them with a real interst in the past of mankind than if we had taken them through a course of Hume and Smollett, or Hallam on the English Constitution, or even the dazzling Macaulay."

Lord Morley on "The Great Commonplaces of Reading."

"I take up a volume of Dr. Smollett or a volume of The Spectator, and say the fiction carries a greater amount of truth in solution than the volume which purports to be all true."

William Makepeace Thackeray.

"Epitomes are not narratives, as skeletons are not human figures. Thus records of prime truths remain a dead letter to plain folk; the writers have left so much to the imagination, and imagination is so rare a gift. Here, then, the writer of fiction may be of use to the public—as an interpreter."

Charles Reade, in "The Cloister and the Hearth."

"What, after all, can we know about the way in which men felt so long ago—Cavaliers or Crusaders

or Romans? But the answer to that is another question. What can we know about the way in which men feel now? The dust of modernity is as thick as the drift of the ages—the only difference is that it has not settled: and still 'we mortal millions live alone.' Every narrative is creation, because understanding is itself a creative act; the strictest history is born dead unless it burns and breathes with imagination from within; if the past *is* only because it *was*, moment by moment that becomes true of the present also; realism and romance are not two different things; the test of any story, scientific, poetic, ancient, modern or futurist, is simply that it convinces."

Gerald Gould in "The English Novel of To-day."

"Sir Walter Scott is dead. Long live Sir Walter Scott! His great discovery that fiction and history are interchangeable is a basic patent, bound to reappear and reappear in the history of literature * * * Not psychology, not realism, not the most intense modernism can kill the historical romance."

Henry Seidel Canby in "The Saturday Review of Literature." (New York.)

The following extracts are from Mr. Nield's Introduction to the above book:

* * * For many years I have been an assiduous reader of novels and tales in which the historical element appeared, supplementing my own reading in this direction by a careful study of all that I could find in the way of criticism on such works and their writers. Only in this way could I venture

on a selection involving a survey of several thousand volumes! * * *

I think many will be surprised to find how large a proportion of our best writers (English and American) have entered the domain of Historical or Semi-Historical Romance. Scott, Peacock, Thackeray, Dickens, Hawthorne, George Eliot, Charlotte Bronte, George Meredith, Thomas Hardy, R. L. Stevenson, Charles Kingsley, Henry Kingsley, Charles Reade, George Macdonald, Anthony Trollope, Mrs. Gaskell, Walter Besant, Lytton, Disraeli, J. H. Newman, J. A. Froude, and Walter Pater—these are a few of the names which appear in the following pages; while Tolstoy, Dumas, Balzac, "George Sand," Victor Hugo, "De Stendhal" (Henri Beyle), De Vigny, Prosper Merimee, Flaubert, Theophile Gautier, Alphonse Daudet, "Anatole France," Freytag, Scheffel, Hauff, Auerbach, Felix Dahn, Georg Ebers, Hausrath, Manzoni, Perez Galdos, Merezhkovsky, Topelius, Sienkiewicz, and Jokai are, perhaps, the chief amongst those representing Literatures other than our own.

"An Egyptian Princess," "Quo Vadis?," "The Last Days of Pompeii," "The Gladiators," "Hypatia," "Harold," "Ivanhoe," "The Talisman," "Maid Marian," "The Forest Lovers," "Quentin Durward," "Romola," "The Cloister and the Hearth," "The Abbot," "Westward Ho!" "Kenilworth," "The Chaplet of Pearls," "A Gentleman of France," "By Order of the Company," "The Splendid Spur," "John Inglesant," "Under the Red Robe," "The Three Musketeers," "Twenty Years After," "The Viscomte de Bragelonne," "Maiden and Married Life of Mary Powell," "A Legend of Montrose," "John Splendid," " Old Mortality," "John Burnet of Barns," "The Betrothed" (*I Promessi Sposi*), "Lorna Doone," "The Refugees," "The Old Dominion,"

"The Courtship of Morrice Buckler," "Dorothy Forster," "The Raiders," "Rob Roy," "Esmond," "The Virginians," "Heart of Midlothian," "Waverley," "The Master of Ballantrae," "Kidnaped," "Catriona," "The Chaplain of the Fleet," "The Seats of the Mighty," "Richard Carvel," "Ninety-three" (*L'An* '93), "War and Peace," "Revolution in Tanner's Lane," "Vittoria"—what visions do these mere titles arouse within many of us! And, though most of the books given in my list cannot be described in the same glowing terms as the masterpieces just named, yet many "nests of pleasant thoughts" may be formed through their companionship. * * *

Perhaps this introduction may be most fitly concluded by something in the nature of apology for Historical Romance itself. Not only has fault been found with the deficiencies of unskilled authors in that department, but the question has been asked by one or two critics of standing—What right has the Historical Novel *to exist at all?* More often than not, it is pointed out, the Romanticist gives us a mass of inaccuracies, which, while they mislead the ignorant (*i. e.*, the majority), are an unpardonable offence to the historically-minded reader. Moreover, the writer of such Fiction, though he be a Thackeray or a Scott, cannot surmount barriers which are not merely hard to scale, but absolutely impassable. The spirit of a period is like the selfhood of a human being—something that cannot be handed on; try as we may, it is impossible for us to breathe the atmosphere of a bygone time, since all those thousand-and-one details which went to the building up of both individual and general experience, can never be reproduced. We consider (say) the Eighteenth Century from the purely Historical standpoint, and, while we do so, are under no delusion as to our limitations; we know that a few of the leading person-

ages and events have been brought before us in a more or less disjointed fashion, and are perfectly aware that there is room for much discrepancy between the *pictures* so presented to us (be it with immense skill) and the *actual facts* as they took place in such and such a year. But, goes on the objector, in the case of a Historical Romance we allow ourselves to be hoodwinked, for, under the influence of a pseudo-historic security, we seem to watch the real sequence of events in so far as these affect the characters in whom we are interested. How we seem to *live* in those early years of the Eighteenth Century, as we follow Henry Esmond from point to point, and yet, in truth, we are breathing not the atmosphere of Addison and Steele, but the atmosphere created by the brilliant Nineteenth Century Novelist, partly out of his erudite conception of a former period, and partly out of the emotions and thoughts engendered by *that very environment which was his own,* and from which he could not escape! * * *

Again, if it be true that the novelist cannot reproduce the far past in any strict sense, it is also true that neither can he so reproduce the life and events of *yesterday.* That power of imaginative memory, which all exercise in daily experience, may be held in very different degrees, but its enjoyment is not dependent on accuracy of representation—for, were this so, none of us would possess it. In an analogous manner the writer of Romance may be more or less adequately equipped on the side of History pure and simple, but he need not wait for that which will never come—the power of reproducing *in toto* a past age. If, in reading what purports to be no more than a Novel, the struggle between Christianity and Paganism (for example), or the unbounded egotism of Napoleon, be brought more vividly before our minds—and this may be done by

suggestion as well as by exact relation—then, I would maintain, we are to some extent educated historically, using the word in a large though perfectly legitimate sense.

* * * The Historical Novel *exists primarily as Fiction,* and, even though in our waking moments we may be persuaded of the unreality of that "dream" which a Scott or a Dumas has produced for us, we shall still be able to place ourselves again and again under the spell of their delightful influence. Moreover, while admitting Dumas' carelessness of exact detail, it would hardly be contended by the most sceptical that his works (still less those of Scott) are without any background of Historic suggestiveness. Scott, indeed, shows signs of having possessed something of that "detachment" which is one important qualification in the Historian proper; there is a fairness and prevision in his historical judgments which we look for in vain when reading the works of his contemporaries. * * * Thus, as regards History, where the textbook fails in arousing interest, the tale may succeed, and, once the spirit of inquiry has been stimulated, half the battle is gained. In saying this, I am far from wishing to imply that the reading of romances can ever take the place of genuine historical study. I know well that such a book as Green's "Short History of the English People" may prove to some young students more fascinating than any novel. There are, however, cases in which recourse may be had to a high-class work of fiction for the attainment of a truer historic sense; while, taken only as *supplement* to more strictly Academic reading, such a work may prove to have its uses. If, besides being of help to teachers, my recommendations should lead in any degree to further appreciation of the great masters of Romance, the very large amount of lab-

our expended over the preparation of this "Guide" will be amply rewarded.

J. N.

II

The following extracts are from the book *A Guide to Historical Fiction* by Ernest A. Baker, M. A., D. Lit. (published by George Routledge & Sons, Limited, London—The Macmillan Company, New York, 1914). These extracts are taken from Dr. Baker's Introduction to his book.

* * * Historical fiction is not history, but it is often better than history. A fine historical painting, a pageant, or a play, may easily teach more and carry a deeper impression than whole chapters of description and analysis. *Esmond and Tom Jones* are indispensable adjuncts to Lecky. Scott and Dumas will always have a larger history class than any two regular historians you could name. Even a second-rate historical novel may have ample excuse for existence. But a good one—good, that is, merely as a story—though chronology may be at fault and facts inaccurately stated, will probably succeed in making a period live in the imagination when text-books merely give us dry bones.

So much for the educational aspect; but there is another. An historical study, though in the form of fiction, may have a positive value as a contribution to knowledge. Just as a portrait or a statue by a great imaginative genius lifts a veil or furnishes a lens by which we gaze into the depths of character, and see problems and enigmas suddenly grow clear, so a great work of fiction—Shakespeare's Cleopatra, Mr. Bernard Shaw's Caesar, Mr. Hewlett's Mary Stuart, or certain of the biographi-

cal studies catalogued in the following pages which it would be invidious to single out, based on original research, and depicting their characters not merely as statesmen or politicians, but as living people, with personal as well as public interests, with ordinary frailties and workaday inconsistencies—gives the historical student a bird's-eye view where previously his sight has been obstructed by details. * * *

The groundwork of the genuine historical romance—melodrama masquerading as historical can be left out of account—is as sincere and valid reconstruction as the best efforts of the serious historian, and much the same methods are employed. Neither can possibly be more than an approximation to the reality; neither can help us to anything but a partial realization of the past which is no more. This, it has been pointed out over and over again, is, in its fullness and vitality, utterly beyond our grasp. We can never put ourselves in the place of an early Victorian, much less of an Elizabethan or a man of the Stone Age. Mental associations are impossible to put off. We should have to cultivate complete amnesia and begin life again, to get more than a faint and rudimentary idea of what our remote ancestors really thought and felt.

It is worth while noticing that we unconsciously put history and fiction on equal terms when, for example, we compare Scott's Graham of Claverhouse with Macaulay's. * * *

Reconstruction of bygone days—people, manners, ways of life, historical events—is the main business of a goodly proportion among the later novels enumerated in the following pages. In the finest historical novel of the last thirty years — Tolstoy's *War and Peace*—the past is portrayed as if it were the present. * * *

Mr. Sabatini is an authoritative historian of the Borgias; Mr. Hutton qualified by research and substantial monographs before he wrote *Sigismondo Pandolfo Malatesta;* and Mrs. Atherton frankly states that she originally intended to write an orthodox life of Alexander Hamilton, but, fortunately, decided, when she came to put pen to paper, to direct her powers of imaginative interpretation and reconstruction to the more genial task of placing her hero in the true human perspective in *The Conqueror.*
* * *

* * * Of historical fiction written for a purpose the output has been huge, though the bulk of it is produced under false pretences. Religious propaganda or apologetics probably accounts for the largest amount, and politics comes next. The mid-Victorian Sunday-school stories about the early Christians typify the didactic class, and Monsignor Benson's studies of the Reformation and the persecution of Catholics are among the best of the controversial. Patriotism was the inspiration of *Westward Ho!* and also, in a more deliberate and calculated way, of Mr. Standish O'Grady's *Bog of Stars.* Several of Kingsley's romances were highly polemical in character, and those of his adversary Newman were obviously meant to inculcate Catholic doctrine. Quite a number of modern examples will be found of the kind of romance, like *The Romans of Partenay* and *Ponthus et Sidoyne,* so common in the Middle Ages, the glorification of a family, sometimes of the writer's own house.

As the index shows, the number of Americans writing historical fiction is portentous, especially for a country which has been alleged to have no history. Their attention is not concentrated, however, on destroying this fallacy; French, Italian, Greek, Russian, and Scandinavian history has been

ransacked for subjects by American authors, who have also produced many remarkable studies of the English Civil War time and other periods. Personal reminiscence plays a significant part in a great many American novels. * * *